# William of Ockham's Early Theory of Property Rights in Context

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# William of Ockham's Early Theory of Property Rights in Context

*By*
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*Cover illustration*: William of Ockham, stained glass window at All Saints Church, Ockham, Surrey.

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# PREFACE

This book aims to lay out clearly and systematically William of Ockham's (*ca.* 1287–1347) early theory of property rights, mainly as it can be understood from the *Opus nonaginta dierum*, an extended defense of a certain conception of the nature of Franciscan poverty. Yet Ockham did not write this massive text merely as an academic exercise unrelated to the events of his day. It is rather a treatise meant to summarize and defend the Michaelist position regarding Franciscan poverty against the rather different picture that emerges from several of Pope John XXII's bulls. In my opinion, a serious study of Ockham's theory of property rights requires a careful consideration of the texts written in the same context as the *Opus nonaginta dierum*; of particular importance are the tracts written by his fellow dissidents, Bonagratia of Bergamo, Michael of Cesena, and Francis of Marchia. This is especially true since, with few exceptions, scholars have had a tendency to jump too quickly from the pope to Ockham. If nothing else, I hope this book demonstrates on the one hand that the Michaelists as a whole deserve further attention in their own right and for helping us understand Ockham better, and on the other that the *Opus nonaginta dierum* obscures the fact that there is no one Michaelist conception of Franciscan poverty.

Although several hundred pages on Michaelist ideas about property rights might seem to fall afoul of the parable "On Exactitude in Science" by Jorge Luis Borges, I hope that some of the topics covered by these texts merits so extended a discussion. Indeed, since much political thought amounts to a justification of why it is acceptable (or even desirable) for individuals or groups to have more things—more property, more wealth, more power, more "say"—than others, it should not be surprising if the writings of Ockham and his confreres discuss topics that would appeal to more than just specialists in Franciscan history. (Or so I hope.) At the same time, it is well known that the *Opus nonaginta dierum*, Ockham's first real polemical work, contains many ideas and theses that would be repeated or expanded upon in his other so-called political works. Thus, by reconsidering the achievements and limitations of the *Opus nonaginta dierum* in the light of the texts he set out to defend, we are left in a better position to understand why he argued so forcefully for certain idea(l)s later on.

The first chapter addresses methodological considerations. It is an attempt to explain why the other chapters have the shape they do. I first explain the nature of the relationship between all the texts discussed in the subsequent chapters, and then try to justify the limits of my effort to contextualize the *Opus nonaginta dierum*. In the final part of the first chapter I quickly outline one modern attempt to capture what ownership means in order to provide an easy frame of reference for understanding what aspects of property rights piqued medieval writers' interest.

Before proceeding directly to the Michaelists, I analyze in synchronic fashion Pope John XXII's bulls on Franciscan poverty. As the pope was the *impugnatus* of Ockham's text, that is, the person whom the *appellans* (Michael of Cesena) "attacked" in his appeals, it is important to understand the pope's own point of view regarding property rights.

The next three chapters each focus on one of the key terms of the debate: *ius*, *dominium*, and *usus*. The third chapter thus examines *ius*, which is commonly translated into English as either "law" or "right"; as I show, Ockham and the other Michaelists use this term in both senses of the word, though I deny that *ius*-as-right should be understood in a purely subjective sense. To latch onto these subjective elements without considering the bigger picture distorts their account of rights. In the first few sections of this chapter I look briefly at how *ius* is employed in the juridical tradition, which is an important but largely neglected source for Michaelist ideas. Although Ockham clearly favoured canonistic sources in his treatise, other Michaelists made use of *utrumque ius*. The remaining sections examine the Michaelist writings, beginning with Bonagratia, and then passing on to Michael, Francis, and William. This order is maintained for the other chapters as well.

The fourth chapter takes up the topic of *dominium*, which I consistently translate as "lordship." Recent scholarship has stressed that for much of the poverty controversy, *ius* was conceived of as a sort of *dominium*. To do so for the Michaelists is highly misleading. (I would argue the same is true for most thirteenth-century authors as well, but that is beside the point here.) It is true that medieval authors often thought that the possessor of a *ius* usually had mastery of some sort, or in some respect, over the thing in which (or person over whom) one had the *ius*; but this distorts the true relationship between these terms in their technical sense. If you have *dominium* you have a *ius* of some kind; but the converse is not necessarily true. The confusion seems to have arisen because earlier phases of the poverty controversy discussed *dominium* and *usus*, while the other, lesser property rights were rarely analyzed in great detail. By the 1320s, the situation had changed: *ius*

had displaced *dominium* as the counterpoint of *usus*; and, in the process, *dominium* becomes explicitly subordinate to *ius*. Two kinds of *dominium* are analyzed in this chapter: divine and human. For the Michaelists, the nature of the possessor of *dominium* did not determine whether the lordship was divine or human; it was instead decided by the *ius* in which it was grounded. A human being could have divine lordship only if it was based in divine law (*ius*), and, *mutatis mutandis*, the same is true of human lordship. Lordship must be justified, and it is justified in law.

The fifth and sixth chapters deal with the thorny problem of *usus*, first in general, then as it relates to consumables. By this point, we are able to draw on the various distinctions made about *ius* and *dominium* to understand what was at stake between John and the Michaelists. *Usus* is analyzed into its constituent types, of which the two most important are the right of using (*ius utendi*) and use of fact (*usus facti*). It is in the fifth chapter that we see the greatest divergence of views among the Michaelists. Consumables seem to constitute a special category when it comes to use since using them means they are consumed. They thus deserve separate treatment. It is also one place where we see Ockham has truly provided an answer that no one else had previously developed.

In one sense the topic of consumables represents a specifically Franciscan problem. The same is true of the seventh chapter, which deals with one of the least well studied aspects of Franciscan poverty, namely its corporate aspect. Yet, as lacking property rights even at the corporate level is what set Franciscans apart from other mendicant orders, this is a topic that should not be ignored. Although I have mostly refrained from any serious examination of earlier phases of the poverty controversy because it is a tale told so often before, I do consider Innocent IV's corporation theory in connection with the bulls he wrote regarding Franciscan poverty, which made Franciscan corporate poverty possible in the first place. Innocent's theory help us understand John's better, and it brings into relief the non-juridical rebuttal of the Michaelists, especially those of Francis of Marchia and William of Ockham.

A conclusion and three appendices round out the volume. The conclusion contains one section that fits uneasily with the content of the other chapters. This section analyzes how Ockham made use of the legal sources so liberally sprinkled throughout the *Opus nonaginta dierum*; combined with the lengthy tables in the third appendix, it demonstrates conclusively that Ockham did not rely only on his fellow Michaelists for his legal arguments. There can be little doubt that Ockham mostly dropped the references

to Roman law while bolstering his case by reference to the *Decretum* and *Decretales*. A further result of this line of investigation should also erase any doubt as to whether the *Opus nonaginta dierum* should be considered a 'recitative' work in the manner of the *Octo quaestiones* or *Dialogus*. Ockham's view is this early treatise is on full display except, perhaps, regarding some of the minor differences of opinion among the Michaelists. Yet, at the same time, by comparing his arguments with those of Bonagratia, Michael, and Francis, we can see the precise extent to which his views were based on theirs. The remaining section of the concluding chapter presents the basics of the Michaelist theory of property rights, and highlights some of the more interesting differences between the texts.

There are two other appendices. The first compares how Michael adapted a key passage of Bonaventure's *Apologia pauperum* to suit his own ends in the *Appellatio maior*. This discussion has been relegated to this position because the point comes up several times in the course of the book, but any serious discussion of these two texts would be too long a digression from the main discussion of the book. The second appendix is a simple comparison of the structure and content of the Michaelist texts in reference to John's bulls (starting with *Ad conditorem*[2]). Although, strictly speaking, this appendix is not necessary for following the argument of this book, I elected to include it because it should prove useful for any future studies of this collection of texts.

A final word should be said about the conventions I have used. Contrary to the current trend, I quote the Latin in the text and offer a translation only in the footnotes. I provide a translation so that my argument can be followed by non-specialists, but the Latin needs to be foregrounded because the subject matter is technical in nature and hiding the Latin in the notes would make it more difficult to see some of the subtleties involved. Of course, I do not mean to deny the value of translations: anyone turning to Ockham's *opera politica* is far better off today than before. I for one gladly made use of these translations—notably, those by Brett (1998); Freddoso (1980); Freddoso and Kelley (1991); Kilcullen and Scott (2001); Loux (1974); McGrade (1992); McGrade and Kilcullen (1995); and Nederman (2002)—when I first looked at Ockham. Obviously, the same could be said of other translated and oft-cited texts.

At the same time, I am quoting from Offler et al.'s edition of the *Opus nonaginta dierum*, from Mariani's edition of the *Improbatio*, and so on, which means I have followed the orthography of their texts and those of the other editors. It is also why I have resisted the temptation to divide the bibliog-

raphy into primary and secondary sources: it is meant as a not so subtle reminder that we do not have Ockham's text as he wrote it, only Offler et al.'s (meticulous) reconstruction. For early printed books, however, I have not hesitated to list them under the name of the author if there is no clear editor given. For these early printed books, I have standardized abbreviations and orthographical conventions with a view to classical Latin, but I always let the spelling of the text stand. For all texts I have modernized legal citations, and I have not hesitated to correct references when necessary; these are marked by a "(!)" in the reference.

Finally, John's bull, *Quia vir reprobus*, presents a somewhat unique problem because it exists in multiple versions, and none of them can be considered critical editions. In the second chapter the references are to the text as it is printed in Gál and Flood (1996); the same is true when dealing with the texts of Bonagratia and Michael, but for Francis and William, I rely on the text as it is quoted in their own works. This seems to be the most sensible method of citation, and any deficiencies in this regard is allieviated by the presence of the the second appendix: those who wish to know where to turn in the works of the other Michaelists should look there first.

# ACKNOWLEDGEMENTS

It gives me great pleasure to acknowledge the people and institutions which made this book possible. First and foremost, I humbly and sincerely thank Professor Jürgen Miethke for suggesting that my rough and unpolished doctoral dissertation might prove suitable for this series. Without his initial encouragement this book would not have been possible. For funding, the Social Sciences and Research Council of Canada (SSHRC) and the Ontario Graduate Scholarship Program awarded fellowships for most of the initial research and writing. The final revisions were again done partly under the auspices of a post-doctoral fellowship from SSHRC. I am very grateful for all their support.

Over the years, I have received encouragement from a number of scholars who have often enough generously shared their work with me, and whom I would like to thank: Melanie Brunner; Peter Garnsey; John Kilcullen; Virpi Mäkinen; Jürgen Miethke; Luca Parisoli; Kenneth Pennington; and Siegfried Van Duffel.

When I first set out to write this dissertation, Peter King graciously agreed to supervise the project and did his best to keep me from making serious blunders. Lawrin Armstrong was supportive from an even earlier stage, introduced me to medieval law, and then tried to save me from many errors regarding the *ius commune*. In the years since then, Joseph Goering, Martin Pickavé, and Giulio Silano asked hard questions and offered many doubts about my conclusions—as did Stephen Lahey when it was time to defend them. I should also mention that Ryan Greenwood, in conversation, over games of pool and many a pint, and in innumerable emails responded to all my queries and complaints with more patience than I deserved. The errors that remain are of course my own; and if I may appropriate the words of Bartolus of Saxoferrato's own treatise on Franciscan poverty, *haec ex inaduertentia, lapsu linguae, et uelocitate calami euenisse credatur*.

Finally, without Kim none of this would have been possible; and, whatever else might have resulted, it is fair to say that it would have been accomplished in far greater temporal and (far worse) spiritual poverty.

Portions of this work have seen print before. I tested some of my ideas in "William of Ockham on the Right to (Ab-)Use Goods," *Franciscan Studies* 67 (2009): 347–374; and chapter seven is a re-worked version of "Innocent IV, John XXII, and the Michaelists on Corporate Poverty," in Anne Scott and Cynthia Kosso, eds., *Poverty and Prosperity in the Middle Ages and Renaissance*, Arizona Studies in the Middle Ages and the Renaissance 19 (Turnhout: Brepols, 2012) 197–224. I would like to thank the editors and publishers for allowing me to include this material.

# ABBREVIATIONS

Where possible medieval texts are cited according to their internal divisions in order of decreasing generality, and followed by a parenthetical reference to the page(s) of the modern edition in which it can be found; other texts are cited only by page number. I have silently modernized both biblical and legal references.

## TEXTS & COLLECTIONS

| | |
|---|---|
| *3 opp.* | Nicholas of Freising(?), *Tres oppositiones contra appellationem Michaelis earumque refutationes* (G&F) |
| *ACC*$^{(1\|2)}$ | John XXII, *Ad conditorem canonum*, redactio prima (G&F), or redactio secunda (Tarrant 1983) |
| AF | *Analecta franciscana* |
| *Alleg.* | Henry of Thalheim, Francis of Marchia, William of Ockham, and Bonagratia of Bergamo, *Allegationes religiosorum uirorum* (G&F) |
| *AP* | William of Ockham, *An princeps…*, (OPol 1) |
| *App. ACC* | Bonagratia of Bergamo, *Appellatio contra constitutionem domini Ioannis Papae XXII, quae incipit "Ad conditorem canonum"* (G&F) |
| *Ap. paup.* | Bonaventure, *Apologia pauperum*(BOO 8) |
| *App. maior* | Michael of Cesena, *Appellatio in forma maiore* (G&F) |
| *App. minor* | Michael of Cesena, *Appellatio in forma minori* (G&F) |
| *App. mon.* | Michael of Cesena, *Appellatio … contra libellum papae "Quia vir reprobus"* (G&F) |
| *App. Sachs.* | Louis of Bavaria, *Appellatio de civitate Sachsenhausen* (G&F) |
| BF | *Bullarium franciscanum* (Sbaralea and Eubel 1759–1904) |
| BOO | Bonaventure, *Opera omnia* (Bonaventure 1882–1902) |
| *Brev.* | William of Ockham, *Breviloquium* (OPol 4) |
| *CB* | William of Ockham, *Tractatus contra Benedictum* (OPol 3) |
| *CE* | William of Ockham, *Compendium errorum Ioannis Papae XXII* (OPol 4) |
| *CI* | William of Ockham, *Tractatus contra Ioannem* (OPol 3) |

| | |
|---|---|
| *CIN* | John XXII, *Cum inter nonnullos* (Tarrant 1993) |
| *Connex.* | William of Ockham, *De connexione virtutum* (OTh 8) |
| *De paup.* | *Tractatus de Christi et apostolorum paupertate*:<br>— Bonagratia of Bergamo (Oliger 1929)<br>— Durandus of St-Pourçain (Miethke 1993)<br>— Hervaeus Natalis (Sikes 1937) |
| *Dial.* | William of Ockham, *Dialogus*. Part 3, Tract 2 in OPol 8; remainder available in Ockham 1962 and the working edition of Kilcullen et al. 1995 |
| *Dilectissimis* | C. 12 q. 1 c. 2 of Gratian's *Decretum* |
| *Epist.* | William of Ockham, *Epistola ad fratres minores* (OPol 3) |
| *Exiit* | *Exiit qui seminat* (= VI 5.12.3) |
| *Exivi* | *Exivi de paradiso* (= Clem. 5.11.1) |
| *Expositio Hugonis* | *Expositio Hugonis de Digna super regulam fratrum minorum* (Flood 1979) |
| FF | *Fontes franciscani* (Menestò et al. 1995–) |
| G&F | *Nicolai Minoritae* Chronica (Gál and Flood 1996) |
| *Historia* | Angelo Clareno, *Historia septem tribulationum ordinis minorum* (Rossini 1999) |
| Hostiensis, *Comm.* | *In Decretalium V libros commentaria* |
| Hostiensis, *Summa aurea* | Hostiensis, *Summa aurea ad vetustissimos codices summa fide diligentiaque nunc primum collata…* |
| *Improbatio* | Francis of Marchia, *Improbatio contra libellum domini Iohannis qui incipit "Quia vir reprobus"* (Mariani 1993) |
| *Impug.* | William of Ockham(?), *Impugnatio constitutionum papae Iohannis* (Knysh 2000) |
| Innocent IV, *Comm.* | *Commentaria in V libros Decretalium* |
| *IPP* | William of Ockham, *De imperatorum et pontificum potestate* (OPol 4) |
| *OND* | William of Ockham, *Opus nonaginta dierum* (OPol 1 & 2) |
| OPh | William of Ockham, *Opera philosophica* (Gál et al. 1974–1986) |
| OPol | William of Ockham, *Opera politica* (Offler et al. 1956–) |
| *OQ* | William of Ockham, *Octo quaestiones de potestate papae* (OPol 1) |
| OTh | William of Ockham, *Opera theologica* (Gál et al. 1967–1988) |
| *QE* | John XXII, *Quorundam exigit* (Tarrant 1983) |
| *QN* | John XXII, *Quia nonnunquam* (Tarrant 1983) |
| *QPE* | Peter of John Olivi, *Quaestiones de perfectione evangelica* |

| | |
|---|---|
| | — *Quaestio octava* (Schlageter 1989) |
| | — *Quaestio nona* (Burr 1992) |
| | — *Quaestio sexta decima* (Burr and Flood 1980) |
| *QQM* | John XXII, *Quia quorundam mentes* (Tarrant 1983) |
| *Quodl.* | William of Ockham, *Quodlibeta septem* (OTh 9) |
| *Quo elongati* | Gregory IX, *Quo elongati* (Grundmann 1961) |
| *Quo iure* | D. 8 c. 1 of Gratian's *Decretum* |
| *QVR* | John XXII, *Quia vir reprobus* (G&F); but also in *OND* and (partially) in *Improbatio* |
| *Sent.* | William of Ockham, *In libros Sententiarum*, (OTh 1–7) |
| *SL* | William of Ockham, *Summa logicae* (OPh 1) |
| *STh* | Thomas Aquinas, *Summa theologiae* (Aquinas 1882–) |

LEGAL CITATIONS

| | |
|---|---|
| (!) | indicates that I have corrected the reference |
| C. | *Causa*; subsection of Gratian's *Decretum*, part 2 |
| c. | *canon* or *capitulum* |
| CICan. | *Corpus iuris canonici* |
| CICiv. | *Corpus iuris civilis* |
| Clem. | The *Constitutiones Clementinae*, promulgated by John XXII |
| Cod. | The *Codex* of Justinian |
| D. | *Distinctio*; subsection of Gratian's *Decretum*, part 1, and of the *de penitentia* and *de consecratione* |
| d.a.c. | *dictum Gratiani ante canonem* |
| d.p.c. | *dictum Gratiani post canonem* |
| de cons. | *De consecratione*; Gratian's *Decretum*, part 3 |
| de pen. | *De penitentia*; C. 33 q. 3 of Gratian's *Decretum* |
| Dig. | The *Digesta* of Justinian |
| Ex. comm. | *Extravagantes communes*, compiled by Jean Chappuis |
| *Glos. ord.* | The *Glossa ordinaria* |
| | — ad *Corpus iuris civilis* (Fehi 1627) |
| | — ad *Decretum* (Gratian 1561) |
| | — ad *Librum extra* (Gregory IX 1561) |
| Inst. | The *Institutiones* of Justinian |
| Nov. | The *Novellae leges* of Justinian |
| q. | *quaestio*; subsection of the *Causae* in Gratian's *Decretum* |
| VI | The *Liber Sextus*, promulgated by Boniface VIII |
| X | The *Liber extra* or *Decretales Gregorii IX* |

# PRINCIPAL TEXTS & EVENTS

| Dates | John XXII | Franciscans |
|---|---|---|
| 7 Aug. 1316 | John XXII elected | |
| 7 Oct. 1317 | *Quorundam exigit* | |
| 26 Mar. 1322 | *Quia nonnumquam* | |
| 4 Jun. 1322 | | *Littera Capituli Generalis Perusini* |
| 7 Jun. 1322 | | *Declaratio Magistrorum facta Perusiis* |
| Sum. 1322(?) | | Bonagratia, *Tractatus de Christi et apostolorum paupertate* |
| 8 Dec. 1322 | *Ad conditorem canonum*[1] | |
| 14 Jan. 1323 | | *Appellatio Bonagratiae* |
| Jan. 1323 | *Ad conditorem canonum*[2] | |
| 12 Nov. 1323 | *Cum inter nonnullos* | |
| [23 Mar. 1324] | [excommunication of the emperor, Louis the Bavarian] | |
| *ca.* May 1324 | | William leaves for Avignon |
| [22 May 1324] | [*Appellatio Ludovici de civitate Sachsenhausen*] | |
| [24 Jun. 1324] | [Marsilius of Padua, *Defensor pacis*] | |
| 10 Nov. 1324 | *Quia quorundam mentes* | |
| *ca.* 1 Dec. 1327 | | Michael arrives in Avignon |
| 13 Apr. 1328 | | *Appellatio Michaelis in Avenione* |
| 28 May 1328 | | Michaelists flee Avignon for Pisa |
| 6 Jun. 1328 | excommunication of Michaelists | |
| 9 Jul. 1328 | | *Littera excusatoria Michaelis* |
| 18 Sep. 1328 | | *Appellatio in forma maiore* |
| 18 Sep. 1328 | | *Appellatio in forma minore* |
| *post* 9 July 1329 | | *Allegationes* |
| 16 Nov. 1329 | *Quia vir reprobus* | |
| 1329–31 | John's problematic sermons | |
| early 1330(?) | | *Improbatio* |
| 26 Mar. 1330 | | *Appellatio monacensis* |
| 24 Jan. 1331 | | *Littera M. de haeresibus Papae* |
| 1332(–34) | | *Opus nonaginta dierum* |
| 4 Dec. 1334 | John XXII dies | |
| 19 Jun. 1340 | | Bonagratia dies (impenitent) |
| 29 Nov. 1342 | | Michael dies (impenitent) |
| *ca.* 1345 | | Francis dies |
| Apr. 1347 | | Ockham dies (impenitent) |

CHAPTER ONE

# INTRODUCTION

To many Franciscans, the situation looked dire in the 1320s. Some, notably the so-called Spiritual Franciscans, had already been marginalized in the previous decade, and the outlook had not improved since then. It was, as Angelo Clareno thought, the time of the sixth and seventh tribulations since the days of St Francis.[1] Others, notably the emerging Michaelist faction, were in transition from cooperating with the pope, John XXII (1316–1334), to outright defiance because of his pronouncements about Franciscan and evangelical poverty.[2]

In many ways, the Michaelist–John controversy was the last great phase of Franciscan thought about poverty and property. The debate never died out entirely, and it exerted a profound influence on subsequent theologians and jurists alike, but the Michaelists failed to attract enough adherents to their cause to effect any meaningful change. Nonetheless, the 1320s and early 1330s were a period of fruitful reflection about poverty—and, by the same token, property rights. It has for this reason attracted a great deal of attention by modern scholars.

Yet this attention has been uneven, partly due to the length of the texts involved, and partly because many of them remained unedited (and untranslated) for so long. Pope John XXII has certainly not been neglected, but even his bull *Quia vir reprobus* (1329) has not always received the consideration it merits.[3] William of Ockham has of course received the lion's share of the scrutiny, not wholly without reason. His *Opus nonaginta dierum* of about

[1] See *Historia*, *trib.* 6–7 (288–309). On Angelo, the best study remains Potestà, *Angelo Clareno*, but see also Burr, *Spiritual Franciscans*, 279–304, as well as the essays in *Angelo Clareno Francescano*; of particular interest in this connection are Accrocca, "« Filii canis–filii spiritus»" and Bartoli, "La dimensione escatologica."

[2] I have preferred to use 'Michaelist' and 'Spiritual' over the older terms *Fraticelli de opinione* and *Fraticelli de vita paupere*, but neither usage is correct if used in a monolithic sense. My forthcoming "Property Rights" tackles the terminology briefly before examining the evolving "Michaelist" views of the previous two decades.

[3] Brunner, "Pope John XXII," esp. 1–15, has recently reviewed the historiography as it relates to John.

1332 may be exceedingly long and rather repetitive, but it contains many important ideas about the nature of property and of rights, and the text is often seen as an important formative step to his later, more overtly political works.[4]

The other Michaelists have not been so fortunate, although things are beginning to change.[5] The most important reason for this change is that we now have critical, or at least convenient, editions of almost all the major texts from the Michaelist camp.[6] These editions, as well as the publication of other relevant tracts from around this time, stand to put the history of this controversy, particularly Ockham' role in it, in a whole new light.[7] The time is surely ripe to take advantage of these developments.

The focus of this book is on the Michaelist theory of property rights. That is, to extract from their writings so far as we can their view of how property is acquired, what legal or moral powers are associated with property rights, how such rights may be lost or renounced, and what kinds of things people can do with other people's property without possessing or gaining any rights over the thing(s) they use. The Michaelists, and John for that matter, were generally only interested in the first and last of these questions. Yet in answering them, they also discussed the other questions. Unfortunately, these discussions often lack the rigour we might wish for since their objective was only to refute, albeit in as many ways as possible, John's claims, and to

[4] Miethke, "*Dominium*, *ius* und *lex*," 241. On the dating, see OPol 1:288, and Miethke, *Ockhams Weg*, 83; Baudry, *Guillaume d'Occam*, 150–53, argued for a redacted version in 1333. McGrade, *Political Thought*, 14 n. 51, and Spade, *Companion to Ockham*, 10, listed the broadest possible range of dates (1332–34). However, 1334 seems to be too late a date, especially when one considers when the other major responses to *QVR* were composed.

[5] Biographical studies of the major protagonists of this study can be found in Robinson, "Ockham's Early Theory of Property," 1 n. 5. See now Lambertini, "Political Theory in the Making" and Miethke, "Der „theoretische Armutsstreit'" for extensive and up to date bibliographies.

[6] The two main editions in question are: Gál and Flood, *Nicolaus Minorita:* Chronica, which is not, properly speaking, a critical edition, and Mariani, *Improbatio*. Of interest, too, especially since consensus on the authorship of the text has not been settled to everyone's satisfaction is the so-called *Impugnatio*, which is edited in Knysh, "Ockham's First Political Treatise?" I have chosen to make sparing use of the text in the notes as a point of comparison with Ockham, but Roberto Lambertini's hesitations deserve consideration; see his "Natural Law" 3:1626 n. 3.

[7] We should mention here Walter Chatton's question in his *Reportatio* 3.16.un, in Wey and Etzkorn, *Chatton: Reportatio* 4:139–68, an important companion piece to the complicated text edited in Douie, "Three Treatises"; Durand of St-Pourçain's *De paupertate*, in Miethke, "Das Votum *De paupertate*"; the *Dicta domini Bertrandi cardinalis de Turre* in Nold, *Pope John XXII*, 178–94; and the *Dicta domini Berengarii Episcopi Tusculani* in Flood, "Review of Nold," 230–35.

demonstrate that Franciscans could not, and did not, have rights protected in human positive law.

I used the word "rights" several times in the last paragraph, and I am concerned that it may lead to false expectations regarding my own objectives. Before I discuss in more detail my method of investigation, therefore, a few words are in order about what I have tried to avoid.

Recent decades have seen a veritable explosion in interest in theories and histories of human rights.[8] Even medievalists have not been immune, and it is perhaps to their credit that they have pointed to the importance of medieval thinkers as a source of later developments regarding theories of natural (or, human) rights. It is partly amusing, and partly frustrating that, as Brian Tierney noted some time ago, non-medievalists feel competent to pass judgment on medieval achievements without taking much effort to engage with the medieval texts themselves or the results of modern research into the middle ages.[9] William of Ockham is a prime candidate for this sort of mistreatment for the simple reason that he has long been associated with the dissolution of scholastic philosophy, and/or a harbinger of things to come, sometimes good, but often bad.[10] In the historiography of natural rights Ockham also played, for some, an important role. Although I am sympathetic to this view, and I am glad to see his name appear in books that encompass a wider span of time than specialized studies can manage, this must be approached in the right way.

It seems to me there are three possible avenues of inquiry; and although they are not mutally exclusive, to accomplish all three would be no mean feat. One approach would be to look at Ockham in terms of his relevance today. While I do not wish to suggest that Ockham is irrelevant for the modern world—far from it!—such an approach is fraught with danger. The problem of relevance is clearly too vague. After all, historians tend to think that the study of history is intrinsically valuable. By that token, though, anyone who wrote even the briefest of sentences about *ius* should be considered relevant. Conversely, would most modern theorists about rights find Ockham relevant

[8] A recent and readable account of twentieth-century developments is Moyn, *Last Utopia*.

[9] Tierney, "Hierarchy," 646. A recent example that comes to mind are the opening chapters of Elshtain, *Sovereignty*, whose discussion on Ockham and the implications of his voluntaristic philosophy had for later political thought (oddly, his own political thought is left untouched) relies on very little scholarship after the 1960s.

[10] Cf., e.g., Gilson, *Reason and Revelation*, 86–88; see *History of Christian Philosophy*, 489–520, for his assessment of the impact Ockham and the uncontrollable "forces" he unleased. Courtenay, *Ockham and Ockhamism*, 1–19, put opinions like Gilson's in their historiographical context.

to their concerns? It seems unlikely. In fact, modern thinkers seem to get along fine without consulting Ockham even though they may get some of the details wrong.[11] But, clearly, the merit of these books does not depend on getting Ockham "right." The simple fact is that the problems confronted by modern rights theorists are usually different from the concerns of medieval authors. Leaving aside for a moment the precise meaning of *iura naturalia*, what should be clear above all is that medieval authors did not doubt their existence in the way people do today. Today one of the first things one must do is demonstrate that we can even talk about them at all; and, if we can, then to try to locate the grounds for justifying their existence.[12]

Given the different justificatory bases, it should not be surprising that the shorter 'path' walked by medieval authors to discussions of *ius naturale* leads to different conclusions about which natural rights exist. But if medieval assumptions about the existence of natural law made medieval conclusions about natural rights suspect to modern audiences, the medieval perspective, as it can be seen the writings of the Michaelists, does offer an advantage over many modern theories: there is no excessive multiplying of what might constitute a human right. According to Ockham, it is a right, all things being equal, to (take steps for one's own) survival based on mentally competent personhood, and which may only be activated in times of extreme need, or in an enviroment not subject to conventional human positive law. (Here "conventional" is meant more or less in the sense of pact-based.) As Ockham moved more into political theory, he became more concerned with what constitutes legitimate positive law, but this was less of a concern early on.

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[11] I cite here only two examples with which I am familiar. Finnis, *Natural Law*, 228, dismissed in passing the significance of Ockham's definition of *ius utendi* as it is discussed by Michel Villey's famous article, "La genèse" (Finnis referred to the essay in the reprinted collection, *Seize essais*). Finnis compared this aspect of Ockham's thought to the so-called choice theory of rights, which is fair enough; but Ockham's theory of rights are not reducible to this theory wholesale. In the preface to the new edition (2011), Finnis wrote that the Postscript will indicate where his argument needs further consideration. Ockham does not figure in this reconsideration in any meaningful way (cf. 415 and 465). Griffin, *On Human Rights*, 30–32, summarized the medieval history according to Tierney, *Idea of Natural Rights* and Brett, *Liberty, Right and Nature*. Griffin is interested in the story of how we got from *ius naturale* to subjective natural rights; in so doing, he wrote that Ockham argued that Franciscans have not renounced property because everyone has an "inalienable natural right to goods when in extreme need." Griffin cited Tierney for support, but he has clearly missed the point of Tierney's message, nor read Ockham's text for himself.

[12] A classic example of this is the first two chapters of Strauss, *Natural Right and History*; but consider also the same two chapters of Finnis, *Natural Law*. James Griffin's "Human Rights," a response to a symposium on his recent book, shows a concern for that "secondary"

I suppose if we left Ockham's theory of natural rights at that, it might appeal to some people today while seeming hopelessly inadequate to others. That is certainly one problem. Another obvious problem is that when it comes to philosophical analysis, the journey is often more important than the conclusions. And Ockham's journey to this conclusion is not one many people today would be willing to make. Even so, discussions of human rights often start with one's intuitions: one begins with an intuition of what human rights are like, or how they must function, or whom they need to include in their embrace, and so on. From there, one moves forward by probing where and why these intuitions do or do not hold up. In this capacity, then, Ockham's 'medieval' conclusions may be of value to today's discussions as one more intuitive starting point to the debate. In a similar vein, I would like to believe that a consideration of medieval journeys to conclusions about the nature of *ius naturale* may even serve to put 'old' problems in 'new' light. It might not have been revolutionary in times past to imagine that natural rights are not normally held *despite* the enactments of positive law, but such an idea might seem shocking to many people today.[13]

Even if the previous paragraph were untrue, as a medievalist and historian, I would still defend the idea that the study of the past has intrinsic value. But only if it is done in a reasonable manner. And in this particular case, I have always thought that intellectual historians benefit even more from modern thinkers than we should expect modern thinkers to benefit from the researches of historians. The benefit is that modern ideas and terminology may provide ways to express or grasp incompletely formulated ideas or terminology from earlier writers. Now, I do not advocate attempting to describe pre-modern ideas only in terms of modern ones. Such an approach is liable either to fail or to produce a distortion of what was meant. But relating elements or aspects of a theory to modern counterparts can be useful. To repeat an earlier example, suggesting Ockham's description of *ius utendi* seems rather like an example of the modern choice theory because it is a right one may choose to exercise (or not). However, it would be wrong to stop there. As it turns out, there are two very different rights of using, and they carry different sets of features depending on which law (*ius*) they are based on; and in the case of the natural right of using, the element of choice seems to be missing. The Michaelists were in agreement on this point: in certain circumstances one may not "choose" to not employ his natural right

problem.

[13] Moyn, *Last Utopia*, 1–5, described the new perspective.

of using; one may not even vow to never employ this natural right. Similarly, insofar as Ockham thought a legal right of using was instrinsically legally defensible by the right-holder against anyone who interferes with the use (which was not, by the way, always true in Roman law), it seems we could speak in terms of the "interest" theory of rights on this score. That is, does Ockham imagine a legal right of using amounts to a duty on others to not interfere with his use?[14]

What I hope is clear in the examples I just gave is that it is possible to make careful use of modern conceptions of, say, rights. But we are doing so only in aid of tyring to get at the bottom of what Ockham thought about rights. It is not meant as an endorsement of one modern theory in favour of the other.[15]

Another approach one might take to the study of Ockham is to locate him in the larger history of thinking about rights. Without getting bogged down in the problem of who was the first to articulate a theory of individual subjective rights, most would agree that Ockham was neither the first nor the last to discuss such matters. It should go without saying that I am in favour of such an approach even if I have not attempted to write such a history myself. There is no doubt in my mind that it is in such bold and sweeping narratives that knowledge of what Ockham thought manages to cross from the desolate wastelands of medieval intellectual history to the fairer pastures of more modern climes. Even so, it is to be hoped that the Ockham who survives such a passage is worthy of the name; that is, that these "bigger" histories are based on solid research conducted on smaller time scales.

Thus the third approach, which is the one I have adopted here: to attempt to explicate Ockham primarily in terms of the language he himself used, framed in an appropriate context which helps us understand both the terminology itself and the underlying meaning—the *uerba ac mens*, as it were. While modern ideas can be useful, resorting to them should remain secondary. It is better to explicate first Ockham's language in its own medieval context. Even more importantly, modern concepts and theories should not be the frame into which we try to fit Ockham's account. Aspects of his views

[14] A brief but clear consideration of the meanings and merits of the choice (or will) and interest theories of rights is Waldron, "Introduction," 9–12.

[15] Nor should it, incidentally, be taken to suggest that the choice and interest theories are describing two different kinds of rights; for more on this with a distinctly medieval bent, see Van Duffel, "From Objective Right", though I must say that he and I remain in friendly disagreement about the relationship of *ius* to *dominium*.

may resonate with aspects of modern ideas, but his was not a modern theory and it would be wrong to pretend otherwise. An even worse mistake would be to assess his theory in terms of the degree to which it anticipates modern ideas or beliefs. At the very least, this would imply that pre-modern theories are only of significance to the extent that they anticipate modern ones, but it also seems to lend itself to thinking that modern theories are the teleological apotheosis of previous ones.

## 1. *Method*

However, because I am twisting these texts to a purpose beyond their original goal, more should be said about my methodology. First and foremost, this study remains focused almost exclusively on the Michaelist texts that were written during the pontificate of John XXII with the intention of showing the extent of Ockham's debt, just as he claimed, to his fellow dissidents. While it is important to be aware of the developments prior to the Michaelist–John stage of the controversy, I have not tried to outline these developments for two reasons. The first is that it is a long and involved story, which cannot be done justice in the span of a few pages, as is evidenced in countless articles in which their authors could not refrain from re-telling some (all to often) garbled version of that story. The second is that it is not difficult to find good studies that cover the whole affair from the time of Francis until our period, so re-treading these old paths is hardly necessary.[16]

I have adopted a synchronic reading of both the pope's and the Michaelist texts. This is not an issue for Francis of Marchia or William of Ockham since the discussion centres on the reading of one long text in each case, but for the pope and for Michael of Cesena it is more problematic. This is because we must consider several texts in each case, and they overlap chronologically. In Michael's case, there is good reason to believe that he was not the sole, nor even the primary, author of the appeals published in his name. There may not be an ideal solution to these problems, but they are not, I think,

[16] The bibliography is vast. If we limit ourselves to monographs and theses, a deep understanding of the poverty controversy from the time of St Francis to Ockham depends on: Brunner, "Pope John XXII"; Burr, *Olivi and Franciscan Poverty*; Burr, *Spiritual Franciscans*; Damiata, *Povertà e potere* (vol. 1); Douie, *Nature and the Effect*; Dufeil, *Guillaume de Saint-Amour*; Horst, *Evangelische Armut und Kirche*; id. *Evangelische Armut*; Lambert, *Franciscan Poverty*; Lambertini, *Apologia e crescita*; id. *La povertà pensata*; Leff, *Heresy*, 51–255; Mäkinen, *Property Rights*; Nold, *Pope John XXII*; Oakley, "John XXII"; Tabarroni, Paupertas Christi; Traver, "Identification"; and Wittneben, *Bonagratia von Bergamo*. A succinct overview is Flood, "Franciscan Poverty."

so grave as they might first appear. Regarding Michael's authorship, there is now the very careful study of Eva Luise Wittneben: anyone who wishes to dispute the role Bonagratia of Bergamo played in helping compose the appeals published in Michael's name will have their work cut out for them.[17] Even so, I believe it is useful to distinguish between the 'early' Bonagratia, who wrote his *Tractatus de paupertate Christi et apostolorum* (1322) and his *Appellatio contra … "Ad conditorem canonum"* (1323) before the pope had written several of his bulls on Franciscan poverty, and the 'later' Michael, who was responding to a more fully articulated picture of property ownership. I refer to these later appeals as Michael's because they were written and notarized as his own. As Wittnebenhas argued, even if Bonagratia deserves the credit as principal author, there is no doubt that the later writings exhibit a greater degree of maturity and coherence of vision. Thus, the division between 'Bonagratia' and 'Michael' is meant more as a chronological division than anything else—though I shall refrain from the unwieldy device of using inverted commas henceforth. An added benefit of separating the two groups of texts is that it helps see how the terminology continued to be refined over the 1320s and early 1330s.

As for the fact that the pope's and Michael's writings overlap one another and span several years, it is true that one might wonder whether we may safely treat the different texts as pieces of a coherent oeuvre. However, as a general rule of thumb, I believe it is important to approach the study of an individual's thought with the assumption that, until one finds strong evidence to the contrary, the person under investigation maintained a coherent position over time on a given issue.[18] That is, I expect a certain amount of change over time, perhaps as certain positions are refined and concepts sharpened, but there is no reason to assume at the outset that there will be glaring contradictions in a person's thought. In the case of both John and Michael, a close reading of their respective texts reveals no such inconsistencies; I therefore feel secure that I can draw forth one overarching theory from all the texts. Since both Michael and John repeatedly refer the reader back to earlier texts to show that their position is unchanged, or that the other person misrepresented their earlier claim, it seems as though they too thought that their own position remained fundamentally unchanged. (One further point to note is, perhaps, that all the controversialists found it

[17] Wittneben, *Bonagratia von Bergamo*; see also her "Bonagratia von Bergamo († 1340)." An older classic on this topic is Becker, "Zwei unbekannte kanonistische Schriften."

[18] On this, I have been influenced by Vlastos, *Socrates*, 236, where he argued for "'charity' as a principle of interpretation."

scandalous how poorly the other side understood what their own side had said.)

One other drawback to the method I have adopted is that, although it seems as though Francis of Marchia completed his so-called *Improbatio contra … "Quia vir reprobus"* before Michael's *Appellatio monacensis*, because Michael's other writings came first, I have had to treat him before Francis.[19] It is not my intention to solve this problem; the most I would insist on is that these texts were likely written over an overlapping period of time, and, as it has often been suggested, including by Roberto Lambertini himself, in a collaborative environment where a lot of informal discussion would have taken place.[20] Suffice to say that the order of discussion in these chapters does not follow the chronological order of their composition except in the loosest of senses.[21]

The method I have adopted owes most to that championed by Quentin Skinner, though on a narrower scale and timeframe than he probably intended to promote. What it lacks in breadth it makes up for in depth. It is contextual in two ways. First, given Ockham's importance as a political theorist, I provide a more detailed account of his early theory of property rights than has been attempted before. Because his analysis of property required a careful discussion of *ius*, the *Opus nonaginta dierum* provides an important foundation for his later, more politically oriented, discussion regarding the rights and powers of papacy and empire. Furthermore, by evaluating Ockham's early views on property in light of the Michaelist texts of the preceding decade, it becomes easier to see where and how, and perhaps even why, Ockham modified or went beyond previous Franciscan defences of poverty.

The second context is the legal background that underlies the debate on Franciscan poverty.[22] From the earliest days, legal concepts helped shape the nature of the debate. William of St-Amour made use of canon and civil

[19] The first reference to the *Improbatio* occurs in Michael's *Littera Michaelis de haeresibus Papae* (G&F, 916), which Accrocca, "Review of *Francisci de Esculo*," 361, dated to between 16 November 1329 and 24 Janurary 1331. The question of the chronological order of these texts has exercised Lambertini; see, e.g., "Francesco d'Ascoli e la polemica," esp. 304–05, and "Fragments," 187–89.

[20] Cf. Lambertini, "Francesco d'Ascoli e la polemica," 302, and Wittneben, "Bonagratia von Bergamo († 1340)," 361.

[21] One should consult the "Chronology of Principal Dates & Events" for further details.

[22] Unless otherwise noted, all legal references are to the standard editions: Friedberg for canon law, except Tarrant for the *Extravagantes Iohannis XXII*; and Krueger et al. for Roman law. For the *Glossae ordinariae*, see the list of abbreviations.

law in his various anti-mendicant writings, and his later massive *Collectiones catholicae*, probably drawing on Gerard of Abbeville's *Contra adversarium perfectionis christianae*, made the famous 'civil law' argument that use and lordship cannot be separated in the case of consumables.[23] Bonaventure, too, did not shy away from making his case by reference to legal texts: his arguments about *peculium* as a rebuttal to the issue of the separability of *usus* and *dominium* is a case in point.[24] Yet, with Bonagratia's involvement in the controversy, starting with his involvement with the repression of the spirituals, the debate becomes increasingly legalistic. Ockham's *Opus nonaginta dierum* in many ways represents a culmination of this trend insofar as there are over three hundred unique references to civil and roman law and their respective glosses.[25] Because of how important the legal background had become by this time, then, I have paid close attention to it, particularly on the question of the origins, or first acquisition of property is concerned. In turn, this has entailed a certain neglect of the historical and philosophical tradition regarding property and rights. However, many good specialized studies on this exist, so the neglect may not feel so pronounced.[26]

By locating Ockham in these two contexts, I am also implicitly including myself in the camp of those who think the link between Ockham's philosophical views and his political views have been over-emphasized. The question can be posed in this way. Was Ockham extending his philosophical programme into the sphere of political theory?[27] Can his politics be some-

[23] William of St-Amour's writings are now nearly all edited, and mostly in critical editions: Traver, "Two Disputed Questions"; Traver, Opuscula *of William of Saint-Amour*; Geltner, *De periculis*. For the *Collectiones*, one must still consult William of Saint-Amour, *Opera omnia*. On the point of separability of use and lordship for Gerard and William of Saint-Amour, see p. 175, below.

[24] *Ap. paup.* 11.7 (BOO 8:312b). See Lambertini, *Apologia e crescita*, 97–98, and Mäkinen, *Property Rights*, 66–67. Cullen, "Property" 832, took this passage as partial evidence of Bonaventure's "keen legal brain," though this seems something of a stretch.

[25] As a point of comparison, Aquinas made 193 references to the *Decretum* across two of his longer works, the *Summa contra gentiles* and the *Summa theologiae*. See McIntyre, "Aquinas, Gratian," 1102. Aubert, *Le droit romain*, 19–23, surveyed a larger number of texts (excluding, however, the *Summa contra gentiles*), ending up with a total of 155 references to Roman law. This marks quite a difference from Ockham's usage of legal texts.

[26] See, e.g., the following recent collections of essays: Cusato and Geltner, *Defenders and Critics*; Kraye and Saarinen, *Moral Philosophy*; Mäkinen and Korkman, *Transformations*; Mäkinen, *Nature of Rights*; and Moreno-Riaño, *World of Marsilius*. I would also like to acknowledge Virpi Mäkinen's generosity in sending me a copy of her most recent collection of essays along with her earlier book (2001).

[27] "Politics" and its cognates are terribly imprecise words to use for Ockham's polemi-

how deduced from his metaphysics, logic, or epistemology? A fair amount has been written about this problem, but I do not think it is a particularly serious one. In the first place, we should assume, barring any evidence to the contrary, that Ockham believed his philosophical and political writings were consistent insofar as he surely felt there was no contradition in, say, adhering to the logical principles adumbrated in the *Summa logicae* and the belief that the true Church might, at one point, be limited to but one faithful believer. But is this the nominalist talking, or is it the polemicist, who thought he lived in a world where the pope and many other important figures had fallen into heresy? Is it not reasonable to assume that Ockham the polemicist was building on similar ideas already expressed in a letter to Guiral Ot around 1330?[28] It is both, I think, but I doubt very much that Ockham would have ever written a single word about the Church residing in one Christian if there had been no poverty controversy in the 1320s.

There is another way to think about this. Could we get to such a conclusion if all we had were the texts edited in in the *Opera philosophical et theologica*? As Boehner remarked long ago, it would seems that Ockham's political ideas "in their great outlines could have been developed" from other metaphysical theories of the thirteenth century.[29] I also doubt that Ockham's philosophical views point inevitably to his political views, but I agree that looking at his philosophical and theological writings can shed valuable light on particular aspects of his political thought. On this front, there has been some useful work. Arthur Stephen McGrade, for example, argued that a consideration of Ockham's "logical individualism" helps us understand his rights theory.[30] In a more recent and rather more successful article, he con-

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cal works—a point well brought out by Höpfl, "Scholasticism," 119–25, for scholasticism in general—but let us side-step this issue for now.

[28] In a text sometimes known as *Quoniam omnis humana sententia* (*ca.* 1331), 'Nicholas the Minorite,' probably Nicholas of Freising (G&F, 18*), after showing that popes can and have fallen into heresy, provided four arguments designed to prove that the entire college of cardinals can fall into heresy as well (G&F, 954–55). The conclusion in each case was: "Ergo collegium cardinalium non est illa Ecclesia quae contra fidem non potest errare." Regarding Ockham's and others' ideas about which part of the Church is immune to error, see Tierney, *Origins*; it generated a great deal of criticism, to which Tierney often responded in writing. Some of these pieces are listed in Robinson, "Ockham's Early Theory of Property," 31 n. 63.

[29] Boehner, "Ockham's Political Ideas," 465–66; cf. Zuckerman, "Relationship of Theories," esp. 13–16. I do not mean to suggest that this is invariably the case. See Lahey, *Philosophy and Politics*, esp. 7–23, and more briefly in Lahey, "Wyclif's Political Philosophy," for weighty arguments that Wyclif's politics and metaphysics are intimately connected.

[30] McGrade, "Birth of Individual Rights"; he was more cautious on the question of internal connections in his book, *Political Thought*.

sidered Ockham's account of rights in light of the role (right) reason played in his moral theory.[31] Of particular importance, however, is the remark that because Ockham and his confreres were trying to convince the wider public of the essential correctness of their position, making an understanding of the arguments depend on technical and intricate scholastic concepts and terminology was likely to hinder rather than help their cause.[32]

A more ambitious attempt was made by Janet Coleman. She thought one could "derive" aspects of Ockham's political thought from his epistemology especially.[33] With some caveats about the details, her arguments are worth consideration, yet I remain unconvinced that any derivation is possible. To take one example, that of corporation theory, I think that, as chapter seven shows, the affinities with previous Michaelist tracts are of far greater importance. Yet her point that we should see what light Ockham's philosophical and theological texts can shed on his later views is well taken. This is apparent in a recent article of hers, where she made use of some logical and ethical writings in the context of what Ockham had to say about (property) rights.[34]

Ockham's legal knowledge is a topic that has experienced a reversal of fortune. When Tierney first addressed Ockham's political thought, he noted with bemusement that the consensus seemed to be that Ockham was a skilled and innovative manipulator of civil and canon law.[35] Partly due to Tierney's recurrent interest in the Franciscan over the decades, Ockham has come to be seen as having possessed only a superficial understanding of the law,[36] or perhaps as a thinker unable to escape the terms of debate as dictated by the lawyer-pope, John XXII,[37] or even as a sort of saviour who eschewed the artificial legalism of the debate in order to reframe the debate in more theological and Bonaventuran terms.[38] It may be that Ockham's *Opus nonaginta dierum* is more Bonaventuran, or even more theological than the appeals of Bonagratia and Michael. After all, the appeals are, by

[31] McGrade, "Right(s) in Ockham."

[32] McGrade, "Birth of Individual Rights," esp. 157, 183; cf. Miethke, "Concept of Liberty," 94.

[33] See Coleman, "Intuitive Cognition" and "Ockham's Right Reason"; the latter article can be found in substance in her book, *History of Political Thought*, 169–98.

[34] Coleman, "Using, Not Owning," 74–83.

[35] Tierney, "Ockham, the Conciliar Theory," 41–42.

[36] See, e.g., Coleman, *History of Political Thought*, 169.

[37] Cf. Leff, *Heresy*, 250; Tierney, *Origins*, 212.

[38] Shogimen, *Ockham and Political Discourse*, 36–71; cf. his "Ockham and Terreni," 520–21. The comments in the former study regarding Bonagratia and Michael are a little suspect, though this is a small complaint in an otherwise fine study of Ockham's political thought.

their very genre, legal documents, not theological tracts. Nevertheless, as this study makes clear, unlike Francis of Marchia, Ockham did not refrain from making his arguments on the basis of citations of civil and canon law, although there is a strong preference for the latter.

Does this mean Ockham was unable to escape the confines of a debate dictated by the pope? Hardly. Such a claim likely rests on a simplified reading of real course of the debate. By the time Ockham had reluctantly entered the fray, at, presumably, Michael's prompting,[39] a great number of texts had already been written and responded to. In fact, there is a certain logic to thinking that when the Michaelists started writing individually-authored tracts such as the *Improbatio* and the *Opus nonaginta dierum*, a new phase of the debate had started: one that implicitly acknowledged the failure of earlier post-*Quia vir* activity.[40] It is even easier to forget how all the texts are related to one another. The following diagram (Fig. 1.1) attempts to illustrate these connections as they pertain to the poverty controversy.

These inner relationships are even more important to understand than knowing their date of composition. A simplified version goes like this.[41] Many texts had been written on evangelical and Franciscan poverty before John drafted the first version of *Ad conditorem*, both for and against some form of the Franciscan position. He even solicited some with his bull *Quia nonnunquam* with the intention of holding a consistory debate on the subject. *Ad conditorem*[1] thus responds to many of these texts, one of which was Bonagratia's tract on the poverty of Christ and the apostles, while two other important ones were the two documents drafted at Perugia.[42] Bonagratia officially appealed against *Ad conditorem*[1] as the Procurator General of the order. John's response was to jail Bonagratia and re-draft *Ad conditorem* in a newer, and presumably better, version. *Cum inter* followed a few months later, though the target was different this time. While the first dealt with

[39] *Epist.*, 3:6.11–17.

[40] Cf. Miethke, "*Dominium*, *ius* und *lex*," 245.

[41] Nold, *Pope John XXII*, argued that the *Cronica* of Nicholas is of limited historical value since it is the product of post-*QVR*, Michaelist concerns. This chronicle apparently paints a black-and-white picture that does not reflect the realities of the early 1320s. That may be, but it is important to bear in mind that, for the Michaelists, it *was* black and white. In other words, although it may be unfair to John XXII's purposes and goals in his four major constitutions on Franciscan poverty, they are treated here in the fashion the Michaelists treated them: as deliberate and considered pieces about the nature of Franciscan and evangelical poverty.

[42] These are edited in G&F, 67–70 and 71–83, dated the fourth and seventh of June 1322; they are sometimes known as the shorter and longer Perugian Encyclicals. I count these as part of the "various texts" in the diagram.

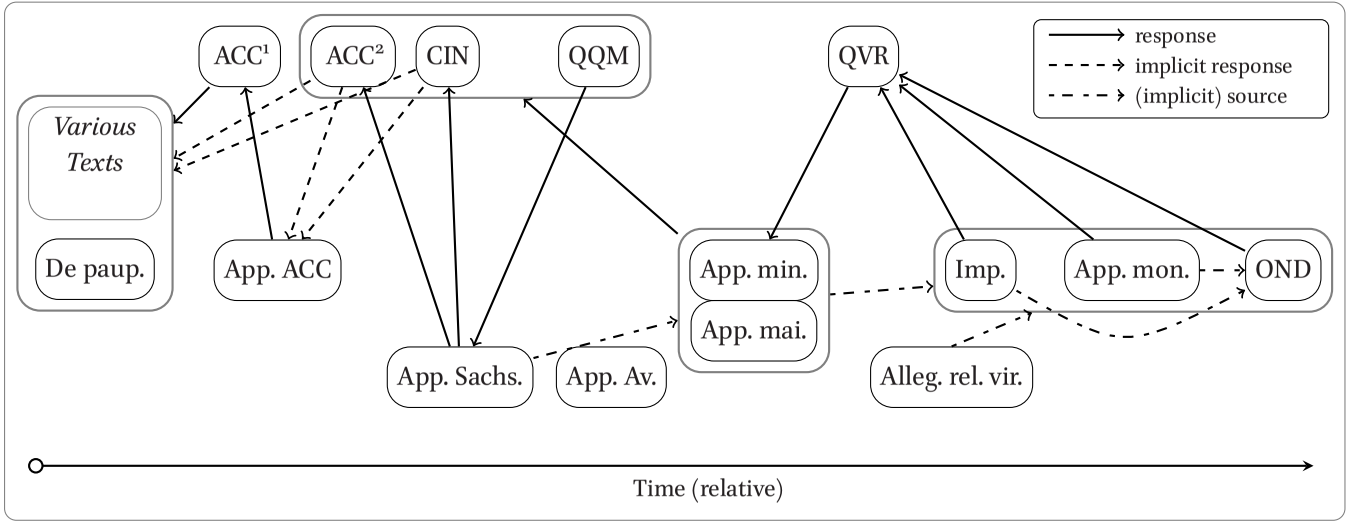


Figure 1.1: The Relationship of the Texts

Franciscan poverty, the second dealt with evangelical poverty. Some see this as a distinction between discipline and doctrine.[43] For the Michaelists, though, the two were entwined.

The Emperor Louis of Bavaria also contributed to the poverty controversy, doubtlessly at the urging of (some) Franciscan(s), but also because he had his own problems with the pope.[44] This text, the *Sachsenhausen Appeal*, deals with poverty at the end, responding to some of the claims of *Ad conditorem*[2] and *Cum inter*. It is not a particularly important or savvy treatment of the topic, yet *Quia quorundam* is in large measure a response to this text. *Quia quorundam* also defends his previous bulls on poverty.

Michael's appeal from Avignon is an outlier to our main concerns, even more so than the *Sachsenhausen Appeal* because it does not contain any serious evaluation of property or poverty. It deals with *Exiit* and the fact that John confirmed *Exivi*, Clement V's pronouncement on Franciscan poverty, *in VII libro*—that is, the *Clementines*.[45] His two Pisan appeals followed shortly, however, and they were detailed responses to the three bulls. The fact that longer and shorter versions were drafted suggests fairly clearly that the Michaelists were interested in promoting their cause beyond the immediate circle of Franciscans.

John responded to the shorter version in *Quia vir*; there is not much evidence he bothered to read the longer one, and some evidence that he did not.[46] Francis and Michael each responded to *Quia vir* around the same time; Ockham drafted the *Opus nonaginta dierum* shortly thereafter. Michael kept to the method of listing and deconstructing the various errors John had made in his bulls.[47] Francis's approach was to defend the positions taken in the Pisan appeals (particularly the longer one) and at the same time expose John's errors, which ran from mis-reading Michael's arguments to getting the historical and theoretical aspects of evangelical poverty just plain wrong—as only a pertinacious heretic could. Ockham mimicked Francis in this way, although he de-personalized it by avoiding proper names. Ockham

[43] Nold, *Pope John XXII*, 170.

[44] On this see Lambertini, "Dalla propaganda," and Miethke, "Der Kampf Ludwigs."

[45] G&F, 186.

[46] See *OND* 83.17–27 (2:644); the corresponding passage of *QVR*, is not discussed by Francis. However, cf. *QVR*, 593, with *App. maior*, 239.

[47] See Accrocca, "Heretical Pope," for a brief listing and discussion of the twelve principal errors.

described himself as a *recitator* of these people's opinions, claiming that he would express his own views later on.[48]

This disavowal of authorship is partly to blame for the idea that John set the terms of the debate and Ockham could not fight his way clear of them. It is a rather preposterous idea, however. He did, first of all, inject some of his own views into the debate—unless we attribute everything for which there is no obvious source to other dissidents such as Henry of Thalheim, who did not write any (surviving) tracts of their on the poverty question.[49] The terms of the debate, moreover, evolved only slowly, and they were certainly determined by more people than John. Ockham's method also means that he was constrained by what Michael had written at least as much by what John had written. Since this was a deliberate choice we should fault him for unoriginality or whatever else as much as we should when we read, say, his commentaries on Aristotle's *Physics*.

Yet Ockham's claim to be a mere reciter of the opinions of others has led some to question whether Ockham deserves to be called an author at all.[50] The problem is not as acute in the case of the *Opus nonaginta dierum* as it would be in the later recitative works. In the *Dialogus*, for example, the student asks the master to present an array of answers to his questions, where the master's own opinion is just one of many—lest he be swayed by the authority of the master.[51] Hardened skeptics will already point to the danger in automatically assuming that the master's hidden view must necessarily be Ockham's own, although this strikes me as overly cautious.[52] The *Opus nonaginta dierum*, in contrast, only has two competing points of view: the pope's and the Michaelists'. Ockham admitted that there are differences to be found in the details of the Michaelist arguments, but Ockham argued

[48] *OND* 124.460–474 (2:857–58).

[49] Henry, Bonagratia, Francis, and William appear as the authors of the *Allegationes religiosorum uirorum*: G&F, 524. This text does not deal with poverty. It recites some of the actions taken against Michael and then argues that Michael's deposition as Minister-General was invalid and that the Chapter held at Paris was not legitimate.

[50] See, e.g., the discussion in Brett, *Liberty, Right and Nature*, 56 n. 23.

[51] 1 *Dial.* prologus. The *Dialogus* is currently being edited by a team led by John Kilcullen, of which one volume has appeared to date: Kilcullen et al., *Ockham.* Dialogus *Part 2* [*and*] *Part 3, Tract 1*. For other portions of the text, I have relied on two different sources: Ockham, *Dialogus*, here 1ra–b, and the online working edition of Kilcullen et al., "William of Ockham: *Dialogus*." On the prologue, see the discussion in Scott, "Ockham and the Lawyers," esp. 171–72.

[52] On this, one should consult Knysh, *Fragments of Ockham Hermeneutics*, 71–151.

that these were of small importance: on the larger issues the Michaelists were all agreed.[53]

Perhaps we can leave this issue behind us by pointing out that Ockham was certainly the author in the most obvious sense of all: he had conceived of and written a massive, complicated text that would report the various Michaelist claims in relation to what John had written.[54]

As I mentioned earlier, my approach to Ockham's texts owes a debt to Quentin Skinner's version of contextualism. It is, I think, a profitable way of studying texts, but not the only way. Skinner's contextualism can be summarized in fairly simple terms.[55] One aspect of his theory has to do with agency. With regard to understanding texts, Skinner argued that there are two related questions which we must answer: first, the issue of understanding what the text means; second, what the author may have meant. Naturally, we must finally decide whether the author meant what he or she wrote.[56] He was adamant, though, that the meaning of the text cannot be entirely synonymous with the author's intentions for the simple reason that a complex text contains more "meaning" than an author could have ever intended to put into it.[57]

To get at what the author was up to "in writing" his text, he relied first of all upon James Austin's theory of speech acts,[58] particularly Austin's claims about a statement's "intended illocutionary force." In order to understand a statement, we must grasp this force *in addition to* the meaning of a statement.[59] The problem of uncovering an author's intentions can be difficult at times,[60] not least because authors regularly achieve more or less than they "intended" to. Similarly, we occasionally face texts where the writer

[53] *OND* 124.463–466 (2:857); see Baudry, *Guillaume d'Occam*, 158.

[54] Cf. Offler's comments at OPol 2:xv. Miethke, *Ockhams Weg*, 432, has also pointed out that Ockham was accustomed to canvassing other people's opinions before providing his own in his academic writings.

[55] See Hamilton-Bleakley, "Linguistic Philosophy" for a concise overview. Clark, *History, Theory, Text*, 138–39, is a little too schematic to be of much use.

[56] There is an uncomfortable elision between the act of speech and text in Skinner's theoretical writings. He argued that "texts are acts," but others have doubted it is that simple; e.g., Clark, *History, Theory, Text*, 139. I feel that much of what he has said about speech acts is applicable to written texts, but his objectors certainly have a point as well.

[57] Skinner, *Visions of Politics* 1:113.

[58] See Skinner, "Motives, Intentions," and *Visions of Politics*, 1:90–102 and 1:103–127.

[59] Skinner, "Meaning and Understanding," 45–46; cf. Skinner, "Hermeneutics," 209. A common criticism of this first point is that Skinner has assimilated written texts to a model of speech, which some people find problematic: Clark, *History, Theory, Text*, 139.

[60] Hamilton-Bleakley, "Linguistic Philosophy," 26.

(wrongly) assumed that his or her audience would have no trouble "securing the 'uptake'" of the intended illocutionary act.[61] However, although there are times when it is difficult to discover the the intended illocutionary force, he argued that it is probably not usually that difficult to imagine that if an utterance (of the text) "constitutes a retort" to some argument, then this is to be explained by the fact that its author intended the utterance to be precisely this retort.[62] Readers can usually secure the "uptake" of—that is, correctly grasp—an author's illocutionary act. Elsewhere he argued as self-evident that for works "centered on a definite polemical point or purpose," "this purpose should be one which the author has consciously formulated to himself."[63] To understand the illocutionary act, therefore, is to understand the author's primary intentions for its utterance.[64]

Although I realize this is not a claim that will satisfy everybody, in large measure I suspect that this is true: *usually* authors of polemical texts are intentionally trying to communicate a point and they are intentionally trying to take the necessary steps for it to be understood in the way they want it to be. Unless there seem to be reasons against adopting this assumption for a particular text, we should feel confident about the author's intentions. Conversely, if our reading of the different parts of the text seems to lead to a coherent interpretation (and coherence is an expected feature of that particular text), then it is reasonable to proceed, cautiously, on the presumption that we are proceeding in the right vein.

Here is an example.[65] Imagine John says to William, "Don't leave Avignon without permission." For William to understand what is going on, he not only needs to understand the literal meaning of the words, but also to know what John "was *doing in* saying what he said." Let us suppose for a moment that John was merely warning William against leaving the city without his

[61] There are both illocutionary forces, which are an exploitable feature of language, and illocutionary acts, which are what agents do when they exploit these forces in communication; Skinner, *Visions of Politics* 1:109. It is important to bear this distinction in mind, for Skinner jumps back and forth quickly between the two.

[62] Ibid., 1:119.

[63] Skinner, "Motives, Intentions," 223–24.

[64] Skinner, *Visions of Politics* 1:98. One thing we must beware is eliding the difference between motives and intentions. Motives—knowing about "what prompted" a speech act independent of their "character and truth-status as utterances"—are not necessarily relevant to the interpretation of a text. Motives actually affect the critic more than is perhaps desirable: knowing that a work was motivated by envy might not tells us much about its meaning, but it is likely to change critics' reaction if they had previously, but wrongly, thought the work had been written simply to enlighten or amuse. See ibid., 1:96 and 98.

[65] Adapted from ibid., 1:104–05.

express permission; according to Skinner we should say that John's statement was made with the illocutionary force of a warning. (It is for this reason that Skinner insists that the illocutionary force must be deliberate and voluntary.) Other consequences may follow. He may have managed to persuade William stay in the city; or, perhaps not. But these are achieved *by* the saying, not *in* the saying; Austin labelled these consequences "perlocutionary." In short, the (speech) act of warning includes not only the utterance with the form and force of a warning, but we must also "mean or intend it to be taken as a warning or its being recognised as an instance of just that intentional act."

For an author to rely on a text to be recognised as, say, a warning means he must write according to the prevailing conventions of his time. (Other intentions may of course require bending, distorting, or even writing against these conventions.) Thus, the second characteristic of Skinner's approach is to stress the importance of context for getting at a text's or an author's meaning in terms of its illocutionary force. This context is not merely the social context in which a text was written, but represents an attempt to see the text "as a meaningful item within a wider context of conventions and assumptions, a context which serves to endow its constituent parts with meaning while attaining its own meaning from the combination of its constituent parts." Although Skinner argued against exaggerating the value of context,[66] we must recover at least the "prevailing conventions and assumptions" if we want to "interpret the meaning of a literary text."[67] The idea is that we should try to uncover what would have been considered a reasonable point of view for the author to have held at a specific time and place.[68]

Contextually speaking, Skinner took up an idea of Wolfgang Iser's that there are three general ways a text may be related to its background, a "spectrum" in Skinner's formulation, which I find a useful way to think about polemical texts. The "dominant" end is comprised of texts where the author's aim was to "affirm a prevailing set of values or attitudes"; the middle of the spectrum is occupied by works where the author's goal was to submit the "ideas or events of the age to discussion and debate"; and the "negative"

[66] Skinner, "Hermeneutics," 227; text and context form a "hermeneutic circle, not a means of breaking out of it." See the more general comments in *Foundations* 1:x–xiii.

[67] Skinner, "Hermeneutics," 216. He felt this was especially true for heteronomous texts: "It seems in short that with strongly heteronomous texts it must be a necessary condition of any purportedly good reading that it should also be a correct one, in the sense that it begins by correctly identifying the polemical purposes of the work, pivoting the rest of its analysis around that central point" (224). Strongly autonomous texts are a somewhat different matter.

[68] Skinner, *Visions of Politics* 1:102; cf. Skinner, "Motives, Intentions," 406.

end is occupied by works in which the "aim is fundamentally to reject some cherished value or assumption."[69]

How, then, does this relate to Ockham? Let us return to the two basic questions Skinner would have us answer. First what is the meaning of the text? I think there are two important ways we should construe 'meaning' here. The first is what we might call the simple literal meaning,[70] but we could also think of it as analogous to the "super litteram" section Ockham included at the end of each chapter where he discussed the literal meaning of various words and phrases. The second way we need to think about this question is when we take 'meaning' in the sense of what Ockham meant by what he wrote in the *Opus nonaginta dierum*.[71] The second sense of meaning corresponds to the second question: what did Ockham mean by what he wrote?

Regarding this last sense of meaning, it seems to me that we should begin by looking at Ockham's professed reasons for writing the *Opus nonaginta dierum*. He suggests a few in the prologue which are worth noting. He began by noting that some people have attacked John's constitution, *Quia vir*. He claimed next that truth shines more in the light the more effectually it has been examined and probed:

> Proinde, cum multa asserta in constitutione *Quia vir reprobus*, pro quibus in eadem constitutione multiplicius allegatum existit, nonnulli satagant impugnare, ipsorum motiva duxi praesentibus inserenda, ut, utriusque partis allegationibus intellectis, ipsa veritas clarius elucescat. Ut autem apertius dictae constitutionis sciatur intentio qualiterque contra ipsam obiectiones adversariorum procedunt magis appareat, ne quis dicat quod verba, non mentem, impugnant, tota constitutio per particulas cum reprobationibus est ponenda; deinde obiectiones et responsiones impugnantium annectentur. Ad subiciendas vero obiectiones, cum nesciam, minime respondebo; sed quod constitutionis conditor antedictae respondeat, ardenter affecto.[72]

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[69] Skinner, "Hermeneutics," 221–22.

[70] Named 'meaning$_1$' in Skinner, *Visions of Politics* 1:91.

[71] Named 'meaning$_3$' in ibid., 1:93. I omit 'meaning$_2$,' or meaning in the sense of what this text means to me, the reader. That is one of the main subjects of this book.

[72] *OND* prol.13–22 (1:292): "Since several people have busied themselves attacking many claims in the constitution *Quia vir reprobus*, for which an account is given many times in the very same constitution, I have decided accordingly that, for those who are present, their motives ought to be included, so that, once the arguments of both sides have been understood, the truth itself will shine forth more clearly. Now, in order for the intention of the said constitution to be known better, and in order that it be more apparent how the objections of the adversaries proceed against it (lest anyone say that they attack the words rather than the meaning), the whole constitution ought to be set down bit by bit along with the rebuttals. Then, the objections and responses of the attackers will be added. However,

Ockham has as his goal nothing more than having the truth—perhaps we should say the Truth—shine forth more clearly! What he takes to be the prerequisite for this, though, is what is interesting. We, the audience, must learn both the intention of *Quia vir* and how these several people have responded to it—and not only so far as the words, but *Quia vir*'s very meaning.[73] I take it Ockham had in mind a point similar to Skinner: we must determine the (basic, literal) meaning of the words, sentences, and propositions, *and* the author's meaning, the "illocutionary force." Of course, since both sides took a dim view of ability of the other side to grasp correctly the intended meaning—*intentio* or *mens*—of a given proposition, it may be that a claim of this sort was itself meant as more than empty rhethoric.

Perhaps the most significant point to notice, though, is that Ockham said that he would not give responses to the claims of these *impugnatores* because he does not know how to. Should we read the last clause ironically then? Did he hope the pope would respond once more so that the Truth would shine forth even more clearly? Or did he think that the pope's only ingenuous response was to admit the errors of his ways?[74] These questions may never be answered with any degree of certainty, but my suspicion is that Ockham was indeed being disingenuous. It is not unreasonable to suppose that Ockham believed there were no good answers to the questions and arguments posed by his confreres.

More importantly, since Ockham did exactly what he claims he would do in the prefatory comments to his work, I take these comments as an accurate representation of Ockham's illocutionary force in writing what he did. The *Opus nonaginta dierum* thus represents an illocutionary act of *explaining* the polemical positions of the pope and his attackers—but explaining the pope's 'real' meaning, and explaining how the Michaelists respond to his claims. As for the intended perlocutionary consequences of writing these words, the most obvious one is that of alerting the text's audience to the truth of the

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I shall not respond to the objections that should be added, since I do not know how. But I ardently hope that the author of the aforesaid constitution will answer."

[73] Let us not exaggerate Ockham's novelty here. Nicholas, the compiler of the Michaelist dossier known as the *Chronica* wrote something similar in his introduction to *3 opp.*, 479: "Nonnullae oppositiones contra supra dictam sive provocationem praefati fratris, Michaelis, generalis ministri, factae fuerunt, quae cum suis responsionibus ponuntur ut sequitur, ut plenius discussa veritas elucescat." One gets the sense that the Michaelists often felt that if people heard the arguments on both sides it would be clear who had the right of everything.

[74] It is worth noting that this is a rather different stance than the one adopted in *OQ* prol.10–21 (1:1:15); cf. 8.9.39–45 (1:217). And it is a far cry indeed from the introductory comments made in the *Improbatio* and *Appellatio monacensis*.

matter regarding the nature of evangelical and thus Franciscan poverty. It is a good rhetorical trick to at once disavow giving your own opinion to a problem and yet claim that you could not imagine how to respond to one side of the debate.

For the preceding paragraph to be accurate, of course, we must investigate the literal meaning of the text. At this stage Ockham's illocutionary intentions are somewhat irrelevant. But if, for instance, he misrepresented his confreres' words and arguments, or said (unintentionally) some ridiculous or impossible things about property rights, then we need to reassess Ockham's claims about what he was doing in writing the *Opus nonaginta dierum*.

The rest of the book incidentally answers questions like these simply by examining Ockham's theory of property rights in the context of what other Michaelists had written. If I may spoil the surprise, one implicit argument is that he does not misrepresent the basic Michaelist position, which means he achieved what he claimed he wanted to; we are, therefore, free to decide for ourselves whether the Michaelist position on the dispensability of property rights is coherent and viable, and—what was more important to fourteenth-century readers—scripturally founded.

This brings us once more to the issue of context. It is a widely known criticism of contextualism that contexts are problematic. Skinner downplayed the difficulty of establishing the proper context when he wrote:

> The appropriate context for understanding the point of such writers' utterances will always be whatever context enables us to appreciate the nature of the intervention constituted by their utterances [i.e., what they were doing in writing that text]. To recover that context in any particular case, we may need to engage in extremely wide-ranging as well as detailed historical research.[75]

We should note that he did not establish general criteria by which we could infallibly determine the proper context and its extent. However, I doubt he thought we could ever give some formula to this end. I cannot hope to solve this general problem, but let me address the question of my context selection; Dominic LaCapra once complained that historians fail "to explain *how* historians select the contexts they find pertinent."[76] Clark's corrective regarding the usefulness of contextualization is that we must remember that "contexts may be either unknown or multiple, are variously

[75] Skinner, *Visions of Politics* 1:116.

[76] Clark, *History, Theory, Text*, 141, citing his essay "Intellectual History and Critical Theory" in LaCapra, *Soundings*, 203.

assigned by different readers, and largely come to scholars of premodernity in already-textualized form."[77]

My solution may be of limited usefulness, but it seems the only way forward is to describe the context I have deemed appropriate. I agree that any given context is likely to require both detailed and wide-ranging coverage; but "wide-ranging" can in fact turn out to be limitless. Even, I think, specifically-chosen contexts can be effectively limitless. In fact, I would have preferred to have employed a far wider context than I have been able to do, but the constraints of time and space have precluded this possibility.[78]

Since I wanted to explore the legal dimensions of Ockham's theory of property rights in a text where he disavowed introducing explicitly any points of his own, there are two obvious contexts that must be considered. First, we have to evaluate what the other Michaelists wrote; and not simply by literal textual comparison either: it is important to see how the theories of property rights matched conceptually—not only because I was interested in these theories at that level, but because one can use different words to mean the same thing.

Medieval jurists comprise the other context. This is due to the fact that I anticipated Ockham's originality in the *Opus nonaginta dierum* to be more pronounced and I thought that a comparison with the texts of medieval jurists would be particularly enlightening. Although this has not worked out the way I had hoped, it remains a useful context to employ for the simple reason that it is a one that has not been fully explored, especially within the context of Michaelist writings, which have been explored even less.[79]

Let us return to the other part of context that Skinner discussed. If we can relate a text to the contextual background in three basic ways as affirming a dominant attitude, neutrally questioning some of the dominant attitudes of the day, or challenging them, how does Ockham's text fit in? I think we can answer this in a couple of ways. The format that Ockham utilized is clearly meant to relate to the general discussion of evangelical poverty in a "neutral"

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[77] Clark, *History, Theory, Text*, 157.

[78] The most obvious lacuna is that I ignore virtually all of the poverty texts prior to the 1320s (partly on the assumption that Ockham did not read most of them himself). The same is true regarding earlier publicist literature, although Lagarde, *Ockham: Défense*, 78, has suggested that Ockham did not read widely in the previous *de potestate papae* literature; cf. Luscombe, "Ockham and the Michaelists," 100.

[79] This is not to say that there have been no important studies on the legal context. Kriechbaum, Actio, ius *und* dominium, Tarello, "Profili giuridici," and Tierney, *Idea of Natural Rights*, e.g., are key in this respect. But none of these studies fully engages with the Michaelists' whole theory of property rights.

way. He wrote as much in the prologue. Yet, as I have suggested, by doing this he hoped to show that the Michaelist position is correct; that is, he thought his text would reaffirm the Michaelist theory of evangelical poverty as both the correct and dominant theory, while John's was the one that deserved scorn. We of course also need to consider how Ockham's text fares against the wider canvass of juristic thought about property and poverty; that is, can we characterize in any way Michaelist views about property as challenging or reaffirming the dominant juridical views of the time? I shall return to this in the concluding chapter.

## 2. *Concepts and Terminology*

Although this study aims to expose the Michaelist theory of property rights through an analysis of certain key terms, a few preliminary words are in order. The first have to do with *dominium* and *proprietas*. For the sake of consistency, I have opted to translate them by 'lordship' and 'ownership.' In the poverty controversy, lordship was usually meant in the sense of proprietary lordship. Although lordship was used in a non-proprietary sense in many other contexts,[80] during the later stages of the poverty controversy, it seems as though *dominium* was frequently paired with *proprietas* to make it clear that the proprietary sense was the one meant. Occasionally one will even find terms like "iure dominii," "dominia proprietatis," and even "dominiorum proprietatem."

In the proprietary sense, *dominium* is a key concept in Roman law. It refers to the greatest, or most extensive, property right one could have. It is 'absolute' in this sense, although this is not to say that the possessor of *dominium* had an inviolable right to his property; rather, it indicated that neither he nor anyone else could have any greater right to his property.[81]

*Proprietas* has caused its own problems for some scholars, but only because they insist in translating the word by its English cognate, 'property.'[82]

[80] Willoweit, "*Dominium* und *Proprietas*," 135; cf. Lahey, "Wyclif's Political Philosophy," § 2 [last accessed 2011 10 28]. Coleman, "Property and Poverty," remains an important survey; now supplemented by Cusato, "Poverty."

[81] On the 'absolute' nature of *dominium*, Birks, "Concept of *Dominium*," remains fundamental. Roman law ideas of lordship are discussed in several places over the next several chapters. For an overview of classical and medieval Roman law concepts and terminology, see Mäkinen, *Property Rights*, 13–17.

[82] A helpful discussion of the term in Roman law is Willoweit, "*Dominium* und *Proprietas*," 139–41.

I do not devote a specific section to the word *proprietas*, so it is important to discuss it briefly here. I am of course aware that *proprietas* can be translated felicitously as 'property' in many cases. I agree that it is true that the Franciscans did not want to have any property in the modern sense of the term. But it is not that they just wanted to avoid having property: they wanted to avoid having property rights. Property to my mind is too easily confused with things, and the Michaelists did not deny that they had things, but that they held property rights to these things. It is for this reason that I translate *proprietas* by 'ownership.' At the same time, for lack of any better alternative, 'property-holder' seems the best choice for *proprietarius*.

So much, for now, for terminology. As for property ownership itself, it is useful to pause briefly and consider how the institution might work. Here we run into a difficulty of sorts. For while most people have some idea of how ownership should or does work, it is, I suspect, a rather hazy one. Even those who have thought a great deal about property and ownership are not in agreement about how it is legitimately acquired, what one is thereby allowed to do, or even if private property is a good or necessary social instituiton.[83] What does owning a book mean, for example, and how different is it—is it different?—from owning a factory? Alternatively, if I own a house, wouldn't paying property taxes be a limitation of my ownership? Or if I own a car, why may I drive it only so fast and only on certain (parts of) roads? These are not easy questions to answer, and I certainly can't answer them here, but they do highlight, I hope, how little we tend to think about such problems. It seems that it would therefore be useful to try to give a sense of one way of thinking about property today in the hope that it provides a useful frame of reference for the Michaelist accounts.

For this task we could do worse than to use Tony Honoré's attempt to describe "the liberal concept of full individual ownership."[84] In doing so, I do not mean to endorse his version over all others. I have chosen it partly because it lays out key concepts more clearly than most, and partly because it shares some (albeit unsurprising) similarities with medieval ideas about property.

The basic concept of ownership is easy to conceive. The owner of a thing is the person who has "the greatest possible interest in the thing which a mature system of law recognizes."[85] That is, it is the owner and not anyone

[83] See Waldron, "Property and Ownership" [last accessed 2011 10 28] for a brief overview and bibliography.

[84] Honoré, "Ownership."

[85] Ibid., 162.

else who has the greatest say in how a thing is to be used or not used. Honoré elaborated on this general point by listing eleven 'incidents,' which he believed were necessary elements of ownership. They are not necessary in the sense that they must all individually be present in the same owner at the same time, but that ownership will usually comprise significant bundles of these incidents.[86]

1. *The right to possess.* The right to possess forms the foundation of ownership. It comprises two rights: (i) the right or claim to be in exclusive control of a thing, and (ii) the right to remain in control of it. Although it is usually understood that some interference from the state may be permitted (when necessary), the point is that no other person has a right to exclude the owner from the thing.
2. *The right to use.* The right, or liberty, to use or enjoy the thing at one's discretion.
3. *The right to manage.* The right to decide how and by whom the thing owned shall be used.
4. *The right to the income.* The right to derive income from the thing, whether fruits, rents, or profits.
5. *The right to the capital.* Here the right refers to the power to (i) alienate the thing and (ii) the liberty to consume, waste, or destroy either the whole or part of it.
6. *The right to security.* That is, immunity from expropriation (except in exceptional situations).
7. *The incident of transmissibility.* The power to transfer the thing to his or her successors.
8. *The absence of term.* The owner may, barring other factors such as insolvency (or death), retain the thing indefinitely.
9. *The duty to prevent harm.* The owner's liberty to use and manage freely the thing owned is subject to the condition that one must not use it to hurt others.
10. *Liability to execution.* An owner's interest may be taken away due to debt or insolvency debt.

[86] The following is based on Honoré, "Ownership," 166–79, who later (183–84) cautioned against thinking ownership was merely a bundle of rights, or that ownership should be thought of only in terms of the relationship between the owner and the thing owned. In

11. *Residuary character.* The rules that govern the reversion of lapsed ownership rights.

It will be clear to anyone even slightly familiar with the poverty controversy that the list of incidents here, debatable though they are, is far more complete than what one reads in some of the better tracts about mendicant and evangelical poverty. However, there are clear points of contact as well, particularly at the top of the list. Perhaps even more importantly, although the use of the word 'thing' in modern discussions may be altogether too vague, in the Franciscan debates, it was one that was always concerned with *res*, or things. For those whose thinking was shaped by the corpus of Roman law,[87] even rights (*iura*) were things, merely incorporeal things (*res incorporales*). At the end of the book we shall return to this list and see how Ockham and the other Michaelists' theory of property rights compares.

summarizing Honoré's extended discussion, I have also relied on Becker, *Property Rights*, 19.

[87] E.g., Inst. 2.2 pr.; cf. Honoré, "Ownership," 182–83.

CHAPTER TWO

# THE POSITION OF JOHN XXII

John XXII, born Jacques Duèse,[1] was elected pope in 1316, shortly after Michael of Cesena was elected Minister General of the Franciscan Order. Both took office after a two-year vacancy, a mere two years after Clement V tried to resolve the internal Franciscan conflict through the publication of the bull, *Exivi de paradiso* (6 May 1312).[2] Opinions are divided as to whether *Exivi* would have at long last provided a workable solution, though it seems unlikely.[3] In any event, the death of Clement (20 April 1314), and that of Franciscan Minister General, Alexander of Alexandria, six months later, made the question academic.[4] Yet *Exivi* had raised hopes on both sides of the conflict, and the subsequent vacancies dashed them. The collapse of cen-

[1] The classic biographical studies of John XXII are Valois, "Jacques Duèse," and Weakland, "John XXII Before His Pontificate." Nold, "Pope John XXII," is a brief survey of John's interaction with the Friars Minor. One should also consult Brunner, "Pope John XXII," 61–100, and "Disorder, Debts and Excommunication," who examined how the pope's earlier training and his dealings with the Order of Grandmont may have influenced his later dealings with the Franciscans.

[2] A detailed analysis of *Exivi*, 2:1193–1200 (also in BF 5:80–86) takes us beyond the limits of this study, but one should consult: Bartocci, "La Regola"; Elizondo, "De evangelii et regulae obligatione," 253–56; Flood, "Franciscan Poverty," 51–52; Lambert, *Franciscan Poverty*, 210–14; Leff, *Heresy*, 155–56; Moorman, *History*, 203–04, 308–09; and Nimmo, *Reform and Division*, 119–34.

[3] On the "Clementine Settlement," see Burr, *Spiritual Franciscans*, 111–77, who has noted (159–61) that even Franciscans wavered in how much they supported Clement's solution, and that we must wonder whether even Clement would have found his solution workable in the long run (202). Compare now his comments in Burr, "Effects," 285–94. Miethke, "Der „theoretische Armutsstreit"," continues to be skeptical of its chances for long-term success; cf. *Ockhams Weg*, 358–59, and De potestate papae, 269. Nimmo, *Reform and Division*, 122, on the other hand, has described it as the "crowning declaration" of all bulls dealing with Fransican poverty.

[4] Moorman, *History*, 309. In fact, Angelo argued that the spiritual Franciscans were persecuted more harshly after the conclusion of the Council of Vienne; see *Historia, trib.* 6 (287–88). Burr, *Spiritual Franciscans*, 161–64, offers commentary. On the issue of how trustworthy Clareno is, particularly under the 'tribulation' of John XXII, see Burr, "John XXII and the Spirituals", esp. 286–87, and Burr, "Clareno's *Chronicle*," 119–24. Burr, "Angelo Clareno, Obedience, and the Commentary on the Rule," is a useful addendum.

tral control, Lambert has noted, allowed for a "resumption of persecution," which, in turn, provided the "stimulus to rank heresy."[5]

### 1. *From Spiritual Suppression to Conventual Condemnation*

Both Michael and John moved with some speed to rectify the lawless state they inherited. At Assisi, Michael and some confreres went to work on revising their order's statutes (along the lines of those done some fifty years earlier at Narbonne), and he sent out an encyclical that emphasized the importance of observing a regular discipline.[6] The pope, on the other hand, began by summoning friars to Avignon, notably Ubertino of Casale and Angelo Clareno.[7] In terms of the later Michaelist-John poverty controversy, one of the chief results of the pope's early interest in the spirituals was the bull *Quorundam exigit* (7 October 1317). The pope would not see the significance of this bull later on in the controversy, but the Michaelists would all make much of the fact that he referred to both *Exiit* and *Exivi* as "profitably published."[8] Although clearly a disciplinary bull in nature, it does provide a definite hint as to what direction John would take in the next decade. One clear example of this occurs when John rates the three traditional vows. Poverty was, he thought, the least important:[9]

> Magna quidem paupertas, sed maior integritas, horum est obedientia maximum, si custoditur illesa. Nam prima rebus, secunda carni, tertia uero menti donatur et animo, quos uelut effrenes et liberos ditioni alterius humilis iugo proprie uoluntatis astringit.[10]

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[5] Lambert, *Medieval Heresy*, 226.

[6] See AF 17:56–58, for the letter; see also my "Property Rights," 157–63. Burr, *Spiritual Franciscans*, 169–70, has highlighted the danger of assuming that Michael of Cesena was elected "precisely *because*" he was predisposed against the spirituals since his early actions seem "evenhanded, attacking excesses of every sort"; but cf. Kelly, "King Robert of Naples," 52, and Miethke, "Der „theoretische Armutsstreit"," 260–64.

[7] *Historia*, *trib.* 6 (289–90). Useful studies of these two on evangelical poverty include: Daniel, "Spirituality and Poverty"; Davis, "Jean XXII et les Spirituels," and *Ubertino da Casale*; Oakley, "John XXII," 55–67; and Potestà, *Angelo Clareno*, esp. 169–94 and 229–45.

[8] *QE* 8–10 (163–64): "super intellectu et obseruantia regule ordinis fratrum minorum declarationes salubriter editas, solidas quidem claras et lucidas multaque maturitate digestas."

[9] John was probably influenced by Aquinas on this point; cf. *STh* 2a.2ae.104.3 (9:387–88) and 2a2ae.186.8 (10:499), *De perfectione spiritualis vitae* 11 (41:B78–80). See also, from a related perspective Brunner, "Poverty and Charity," 250–52 and 254–57.

[10] *QE* 191–194 (178–79): "Great indeed is poverty, but chastity is greater, [and] the chief of these is obedience, if it is kept unharmed. For the first is given to things, the second to the flesh, but the third to the mind and soul, which it binds like the free and unbridled [are] to

There has been some confusion as to how we should translate *integritas*. If simply translated into the English word that resembles it most, it seems as if John is simply making a point about keeping the order whole, that the rift in the order needs to be healed, and that it is obedience rather than poverty which is the greatest means to this end.[11] But as the second sentence makes clear, to translate it thus is incorrect: John was making a point about the three vows. As such, we must translate the word as "chastity," or "continence," and take him to be comparing the relative importance of these vows.[12] In the pope's opinion, poverty is no doubt important, but it pales in comparison to the need for obedience. The use of "humilis" was an added barb, for *humilitas* was no less important to St Francis than *paupertas*.[13]

The point about obedience was an old one, stretching all the way back to Francis himself.[14] In short, the problem was that the friars were obliged to obey their superiors in everything—except what was not damaging to the soul or contrary to their rule. Everyone naturally agreed that, as Franciscans, they needed to obey their superiors, but not everyone agreed upon what was salutary and in harmony with their rule. In the case of clothing, like much else, Clement had tried to compromise. So-called cheapness of clothing (*vilitas vestium*) was to be observed by all brothers, but there could be no single definition of what that meant since the environments in which the friars lived could vary quite dramatically. Thus, just what constituted cheapness had to be determined by the ministers, custodians, and guardians of each region.[15] David Burr once wrote that the end result was that disaf-

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the control of another humble man by the yoke of one's own will."

[11] So Lambert, *Franciscan Poverty*, 227, and *Medieval Heresy*, 229; Leff, *Heresy*, 208; Mäkinen, *Property Rights*, 145; Nimmo, *Reform and Division*, 137; Shogimen, *Ockham and Political Discourse*, 39, and Wittneben, *Bonagratia von Bergamo*, 82.

[12] As Moorman, *History*, 311; and Burr, *Spiritual Franciscans*, 196–97, understood. However, it is possible that John wanted us to keep both meanings in mind.

[13] *Regula bullata* 9.1 (258): "Omnes fratres studeant sequi humilitatem et paupertatem Domini nostri Jesu Christi…." Cf. his *Regula bullata* 3.11 (230), *Admonitiones* 23.1 (78), and *Epistola toti ordini missa* 27–28 (144).

[14] The clearest example of how confusing it could be to know when to obey or not obey comes from Francis's *Admonitiones* 3.5–11 (64–65). See also *Epistola ad fideles* (*Recensio posterior*) 40–41 (121), and *Regula non bullata* 5.2–3 (250), and the remarks of Nimmo, *Reform and Division*, 34–47, and Tabarroni, "Povertà e potere," 176–77.

[15] *Exivi*, 2:1195–96: "Vilitatem autem vestium tam habitus, quam interiorum tunicarum, illam intelligi debere dicimus, quae secundum consuetudinem vel conditionem patriae debeat quantum ad colorem panni et pretium vilitatis merito reputari. Non enim quoad regiones omnes potest determinatus unus modus in talibus assignare. Hujusmodi etiam vilitatis iudicium ministris et custodibus seu guardianis duximus committendum, eorum

fected subordinates still felt they were "left with the responsibility of judging whether their superiors [were] within the accepted parameters."[16]

The double vacancy paradoxically made it difficult for the spirituals to work within the law, but served them well when they chose to stray from it.[17] With the election of Michael of Cesena as Minister-General, and the election of John XXII shortly thereafter, the situation changed yet again. Michael made it clear how little he cared for the spiritual cause, which left the dissidents with but one option: the pope.

John became the "linchpin of their entire defense"[18]—but only if he agreed with them. The pope, however, chose to side with the leadership of the order, and *Quorundam exigit* is a good early example of this. On the point about *uilitas*, John explained that the superiors not only decide what clothing is to be worn but also whether it is being maintained.[19]

*Quorundam exigit* also supported the storage of certain consumables, such as wheat and wine, which also did not sit well with the spirituals.[20] Michael, however, used the statements of the bull as the basis of his investigation of the spirituals detained at Avignon, starting 12 October 1317. Meanwhile, John focused on reining in the other dissidents. To this effect, John published two more bulls within one month of each other, *Sancta romana* (30 December 1317) and *Gloriosam ecclesiam* (23 January 1318), in which he emphasized that it was the Franciscan leaders who are to decide how Franciscans are to live, and that the friars are to be obedient to them (and, a fortiori, that John himself is to be obeyed).[21] Poverty was not yet as serious an issue as it would become, though doubtlessly it lay in the back of everybody's minds.

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super hoc conscientias onerantes, ita tamen, quod servent in vestibus vilitatem. Quorum etiam ministrorum, custodum et guardianorum iudicio eodem modo relinquimus, pro qua necessitate possint ipsi fratres calceamenta portare."

[16] Burr, *Spiritual Franciscans*, 164. That is to say, although *Exivi* tried to confirm that the guardians would insist on a reasonably strict interpretation of Franciscan poverty, and which would not be open to a general debate, those unhappy with their apparently lax superiors were wont to place undue stress on the phrase "ita tamen, quod servent [the superiors] in vestibus vilitatem."

[17] Ibid., 169.

[18] Ibid., 172.

[19] *QE* 174–185 (177–78); cf. Robinson, "Property Rights," 159. As Burr, *Spiritual Franciscans*, 201, has noted, from John's perspective it was preposterous to imagine that it was up to the "subordinates to assume that they could measure their superiors' decisions on specific practices against some theoretical standard of poverty."

[20] *QE* 153–163 (176).

[21] Respectively edited in Tarrant, *Extravagantes*, 198–204, and BF 5:137–42 (no. 302).

It would not be long, however, before the problem of poverty bubbled back to the surface in Avignon. The nature of the link between poverty and obedience was such for the Franciscans that the one always led back to the other.[22] Thus it was that within a few years of the sad tale of the four spirituals being burnt at the stake in the spring of 1318 for withholding their obedience,[23] John had put Niccolo da Prato, cardinal bishop of Ostia, in charge of investigating Olivi's Apocalypse commentary, and the Minorite view came under fire once again.[24]

The story is a familiar one, famously opening the *Chronica* of 'Nicholas the Minorite.'[25] Briefly, it goes like this. Jean de Beaune, a Dominican inquisitor, came across a beguin who insisted that he believed in the absolute poverty of Christ and the apostles. Jean, following standard practice, consulted with a number of local experts. One of these was Berengar Talon, a Franciscan lector, who explained that rather than heretical, this was the view of the entire Franciscan order, and enshrined in the decretal *Exiit*. Undeterred, Jean responded by accusing Berengar of heresy as well, unless he were to revoke his claim. Berengar, of course, was unwilling to do so, and instead—not surprisingly, given the historical success of this method[26]—he appealed to the pope. As David Burr has said, "John reacted vigorously and, one suspects, enthusiastically."[27] The difference this time around, however, was that the reigning pope was not so certain that *any* Franciscan position on poverty was correct. Rather than putting an end to a small debate in Narbonne, the appeal served as a pretext for a re-opening of the poverty question.[28]

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[22] Peter Olivi, e.g., repeatedly claimed that the pope could not modify the vow of evangelical poverty, or expect obedience if he tried to do so; see, e.g., *QPE* 16 ad 12 (57–58).

[23] See *Historia*, *trib.* 6 (292–97).

[24] Burr, *Spiritual Franciscans*, 204–12, analyzes the events.

[25] G&F, 62–63. See Baudry, *Guillaume d'Occam*, 105–07, Miethke, "La théorie politique" 2:93–94, and Tabarroni, Paupertas Christi, 11–13, for discussion. For a corrective review of the value of the *Chronica* (at least for the period before *CIN*), see Nold, *Pope John XXII*, esp. 1–24; but see the critical review of Flood, "Review of Nold."

[26] Cf. Miethke, "La théorie politique" 2:100.

[27] Burr, *Spiritual Franciscans*, 263; cf. Miethke, De potestate papae, 168. Maier, "Annotazioni" has provided good evidence of John's surprisingly wide-ranging intellectual pursuits while pope, to the point of even taking an active part in the compilations destined for his own use.

[28] This he did with *Quia nonnunquam*. There is still some doubt as to why John XXII moved from his repression of the spiritual Franciscans to an attack against Franciscan poverty in general. Turley, "John XXII and the Franciscans," reviewed many of the different opinions, before opting for Carmelite anti-Franciscan pressure as the main culprit. Burr, *Olivi's Peaceable Kingdom*, 244–47, suggested that once John aware of the significance of the poverty

## 2. *John's Early Account of Poverty:* Ad conditorem canonum, redactio prima

No one, I think, would accuse John of being an un-opinionated pontiff; in fact, it has recently been pointed out that John investigated and subsequently condemned more theologians than any other medieval pope.[29] Still, he has not always been given the credit due him.[30] For instance, we would do well to recall Melanie Brunner's point that John was able to deal fairly and even-handedly with individual Franciscan friars and convents during the period between *Quia nonnunquam* and *Cum inter*. He did not, it seems, allow his problems with Franciscan poverty colour how he treated the order on other practical matters.[31] But even if he was probably not as rash as, say, Angelo Clareno was wont to portray him, and though he was fond of the academic jousting found in the consistory debates of Avignon, he took his time to make up his mind. Such is true, at least, of the controversy over Christ's poverty.[32] If we take the Berengar incident as the starting point for this controversy, which Nicholas claimed took place in 1321, then we must note that John's first considered response came only at the end of 1322 (8 December).[33]

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controversy, the condemnation of Olivi could serve as a "weapon in that struggle"; but see Burr, *Spiritual Franciscans*, 264–67, for some further reflections on the continuities of papal responses to the Franciscans from Boniface VIII through to John XXII. Nold, *Pope John XXII*, 157–58, much like Lambert, "Franciscan Crisis," before him, has recently argued that the pope simply could not accept "nominal rather than real" papal retention of ownership, and saw it as the "root cause of the Spiritual problem." Oakley, "John XXII," 67, has suggested that Ubertino da Casale, unwittingly or not, urged a re-opening of the poverty question in the course of his defense of Peter Olivi. And, finally, Gonzales, "'King of the Locusts,'" 74, has suggested that the pope was not so interested in the poverty issue as in reevaluating the role the Minorites should play in the Church.

[29] Miethke, "Der „theoretische Armutsstreit"," 258; cf. "Ockham und die Kanonisten," 397. Nold, *Marriage Advice*, lv–lxv, is a wider-angle view of the pope's intellectual pursuits.

[30] Cf. Nimmo, *Reform and Division*, 198–99.

[31] Brunner, "Papal Interventions," 353–54.

[32] As Maier, "Annotazioni" and Duval-Arnould, "Les conseils," have shown, John had compiled for himself a massive collection of opinions to study in preparation for *CIN*. According to Duval-Arnould, "On ne peut dire s'il a tout lu, mais ce qui est certain, c'est qu'il a lu attentivement" (194). See also the interesting study of Nold "John XXII's Annotations," who has examined *in extenso* the pope's annotations of the *Regula bullata*, although he argued quite convincingly that these annotations were made after *QVR* and thus not relevant to the purpose of this chapter.

[33] Of course, first he lifted *Exiit*'s ban on further discussion of evangelical poverty in *QN*. According to Damiata, *Povertà e potere* 1:315, the publication of this bull heightened the

John's writings on Franciscan poverty very closely mirror Franciscan attempts to explain the theory of evangelical poverty clearly and concisely. Doubtlessly, John felt the first version of *Ad conditorem* to be a clear statement of the (insurmountable) problems of the Franciscan theory and practice of evangelical poverty; however, once people began to look a little more closely at his theory, the cracks kept on growing. Thus, much as Ockham would be limited in how he could modify the poverty theory of his confreres, *Ad conditorem*[1] is of significance because it provides the broad contours of John's theory of ownership. In his subsequent bulls, John would fill in the details, but he would do no more than bend or stretch the limits of his theory.

In an obvious echo of *Quia nonnunquam*, *Ad conditorem*[1] begins by claiming that it is up to the "author of canons" to rectify the statutes of his predecessors if and when he sees that they are doing more harm than good.[34] Following his point that the pontiff is to remedy harmful statutes, John listed a series of provisions established by previous popes, particularly the papal retention of *dominium*—only to conclude that although his predecessor Nicholas III had ordained these things, John had come to realize that they had not benefited, but harmed, the friars.[35] In particular, John argued that the "retention of lordship over [both movables and immovables had] harmed the brothers."[36] The problem with the papal retention of lordship was in fact twofold. First of all, when talking about the perfection of the Christian life, the perfection actually consists in charity, "which is called 'the chain of perfection' by the Apostle."[37] Poverty simply does not play that important a role in Christian perfection. What John preferred to stress in regards to poverty was one's interior disposition. Thus, Peter's words in Matthew 19:27 ("Behold! We have left everything behind") meant that the apostles left everything "with respect to the care and affection for those things, with-

animosity both between the Franciscans and Dominicans and within the Franciscan Order itself.

[34] *ACC*[1], 83: "Ad conditorem canonum non est dubium pertinere, cum statuta a se vel praedecessoribus suis edita obesse percipit potius quam prodesse, ne ulterius obesse valeant, providere." Cf. *QN* 4–8 (217–18), but note that the version of *QN* printed in G&F, 64–65 differs slightly. See Nold, *Pope John XXII*, 149–58, and Oakley, "John XXII," 139–51, for an analysis of *ACC*[1].

[35] *ACC*[1], 84: "Quamquam autem pia consideratione a praedecessore nostro praedicto [Nicholas III] haec fuerint ordinata, ipsa tamen hactenus profuisse dictis fratribus non percepimus, sed potius ipsis et aliis multipliciter obfuisse."

[36] *ACC*[1], 85: "retentio dominii supra dicta [both movables and immovables] fratribus ipsis obfuerit."

[37] *ACC*[1], 84: "perfectio vitae christianae principaliter et essentialiter in caritate consistat, quae ab Apostolo *perfectionis vinculum* [Col. 3:14] dicitur."

out an abdication of lordship."[38] This leads directly to the second problem: rather than pave the way to this perfection (for such is the purpose of the contempt of temporal goods, which Franciscan abnegation was supposed to inspire), Franciscan poverty has not diminished their *sollicitudo*—that is, their overwrought anxiety for temporal goods—compared to members of other religious orders. This alone is enough to show that the friars' special mode of expropriation can confer nothing *ad perfectionem*. But the problem went even deeper. What has in fact happened is that, "by reason of [papal] retention" (*occasione retentionis*), the friars have begun to boast hollowly of their highest poverty.[39] In essence, what we have here is both an axiom and a definition of the problem: religious poverty, at best, serves an instrumental role on the path to religious perfection;[40] the problem, of course, was that this useless property arrangement was doing more harm than good.[41]

There was more. In John's view the whole theory was flawed. The theory that had been developed in *Quo elongati* and *Ordinem vestrum*, and which had been re-affirmed in *Exiit*, was that the lordship and ownership of the things used by the friars remained with the donors and benefactors; if they refused to keep such control after the donation, then the lordship would pass to the Holy See. As far as the brothers were concerned, they could enjoy no more than a *simplex usus facti* of things.[42]

John again chose to discuss this notion in terms of both theory and practice. Although he did not use the phrase *simplex usus facti* in the first version of the bull, employing instead *nudus usus facti*, there can be little doubt that

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[38] *QVR*, 563: "quoad curam et affectionem illarum sine dominii abdicatione."

[39] *ACC*', 84–85. See also Condren, "Rhetoric, Historiography," 21; Shogimen, *Ockham and Political Discourse*, 47.

[40] John's views on poverty have often been compared to those of Aquinas, whom he read carefully, and who is often thought to be a proponent of an "instrumentalist" theory of poverty (e.g., Miethke, *Ockhams Weg*, 377; Tarello, "Profili giuridici," 418); see, e.g., *STh* 2a2ae.188.7 (10:530–32). My understanding of Aquinas's writings on poverty is particularly indebted to Eijnden, *Poverty on the Way to God*, and the articles of Jones, "Poverty and Subsistence," "Concept of Poverty," and "St Thomas Aquinas."

[41] Nold, *Pope John XXII*, 154, has claimed that John's comments about the connection between poverty and perfection and their relationship to charity were so "inclusive" that it would have been equally palatable to the Franciscans as to the Dominicans. But it is not likely that many Franciscans would endorse John's instrumentalist understanding of the value of evangelical poverty.

[42] *Exiit*, 2:1113. This was a development of Bonaventure's account of *simplex usus*; see *Ap.paup.* 11.5 (BOO 8:312a), and 12.20 (BOO 8:322b). The relationship between these two texts has often been noted; the most detailed demonstration is found in Maggiani, "De relatione," but see also the source analysis in Elizondo, "Bulla « Exiit »," 82–102. I discuss *Quo elongati* and *Ordinem vestrum* in chapter 7.

John saw the terms as approximately equivalent.[43] In any event, the real problem with papal retention of ownership was that it could not be true in the case of consumables:

> Quod autem non sint nudi usuarii in rebus quae usu consumuntur, evidentius declaratur, in quibus dicere quod usus iuris vel facti a dominio separatus possit constitui iuri repugnat et etiam rationi.[44]

Aside from being repugnant to law and reason, he also noted that, in the case of consumables, it is hardly likely that Nicholas III had intended to reserve the lordship of each crust of bread and cheese that the friars 'used.'[45]

For the sake of the argument, however, John was willing to suppose (*esto*) that use could be established in the way the Franciscans suggested. Even so, such use could in no way be called *nudus*. The reason is that the use of a consumable by a non-owner does not differ from the use of the one who has full lordship because in both cases the object is wholly consumed. Since we do not say that the one who has full lordship of the object has 'bare' lordship, neither should we consider the use of such things 'bare.'[46] If anything, John noted, since it is always the intention of the donor and the friars that *only* the friars be granted the profit (*compendium*) of these things, and since the Church neither gains, nor hopes to gain, any advantage (*commodum*) from the arrangement, it should be supposed that the papal lordship of the goods used by the friars that is called "bare, verbal, and mathematical" (*nudum,*

[43] If anything, John probably felt that "simplex usus facti" was an ill-advised way to pick out what Roman law meant by "nudus usus." Nold, *Pope John XXII*, 150, has argued that this difference meant both that *ACC*[1] was "not primarily focused on the technical term used by *Exiit* (or by the Chapter General of Perugia) to describe Franciscan and apostolic use," and that John's real target had to be Cardinal Vital du Four because he used the same phrase (see ibid., 76–77, for quotations). But does this really make sense? The Cardinal did, as Nold noted, use *simplex* and *nudus* interchangeably, and John indeed noticed. But by choosing to use *nudus* instead of *simplex*, the pope was not eschewing the technical legal terminology of *Exiit*, but rather employing the more obviously technical legal term—just as he employed legal arguments elsewhere in *ACC*[1]. 'Bare use' could not be further from 'simple use' (Vital, perhaps, did not realize this); the latter term originated with Bonaventure, while the former comes from Dig. 7.8.1.1: "Constituitur etiam nudus usus, id est sine fructu: qui et ipse isdem modis constitui solet, quibus et usus fructus." Thus we should interpret John's choice of words as a deliberate re-positioning of the debate into the context of civil law, which is, in fact, how the Michaelists took John's choice of terminology.

[44] *ACC*[1], 85: "But it is is more clearly shown that they are not 'bare' users in things which are consumed by use: it opposes law and reason to say in these things that a use of right or of fact can be established separate from lordship."

[45] *ACC*[1], 85.

[46] *ACC*[1], 86.

*verbale et mathematicum*). And if this is true, then it is hard to see how having or not having the lordship of these goods would ever make one poorer or richer.[47]

The sarcasm in these passages has not dulled over the centuries, but he was no less serious for it. Papal overlordship of Franciscan goods was a fiction because, under Roman law, there could not be a permanent usufruct.[48] It is possible that John may also have had another passage from Justinian's *Code* in mind, which abolished the distinction between a lord who had *nudum* [*dominium*] *ex iure Quiritium* and one who had a thing *in bonis*.[49] In the first case, the lord had bare lordship (that is, without any right to the use or fruit) according to the *ius Quiritium*, the ancient, formalistic Roman law. The second referred to a *res* that was merely considered to be part of one's effects (*in bonis esse*); in this case, the lord did not really have ownership of the thing (but could later acquire it through *usucapio*).[50] Justinian evidently felt that this distinction was of no use. In an effort to simplify the complicated system of ownership, *Code* 7.25 ruled, as it were, that a lord is a lord is a lord: "sed sit plenissimus et legitimus quisque dominus sive servi sui sive aliarum rerum ad se pertinentium." When the pope said it was the papal lordship and not the Franciscan use that was "nudum, verbale et mathematicum" or "enigmaticum" he may well have been alluding to Justinian's own dislike of *nudum dominium*.

Regarding the practical problems associated with this use–lordship arrangement, John felt that it was not even observed in practice. *Ad conditorem*[1] therefore listed all the things *Exiit* permitted the friars to do with the goods they could use. In certain cases it even was licit for a friar to exchange

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[47] *ACC*[1], 86. In *ACC*[2] 252 (250), he called the reservation of this lordship *uerbale, nudum ac enigmaticum*.

[48] *Glos. ord.* ad Inst. 2.4.1, s.v. "abscedente," and Dig. 7.3.1.3. As Villey, "La genèse," 112, drily noted, bulls like *Ordinem vestrum* and *Exiit* meant that "Rome avait l'étiquette et les moines franciscains la chose ; à la Paupauté la fumée, aux Franciscains le rôti." Cf. Tabarroni, Paupertas Christi, 74; Töpfer, "Anschauungen," 296.

[49] Cod. 7.25.1: "Antiquae subtilitatis ludibrium per hanc decisionem expellentes nullam esse differentiam patimur inter dominos, apud quos vel nudum [dominium] ex iure Quiritium vel tantummodo in bonis reperitur, quia nec huiusmodi esse volumus distinctionem nec ex iure Quiritum nomen, quod nihil aenigmate discrepat nec umquam videtur neque in rebus apparet, sed est vacuum et superfluum verbum, per quod animi iuvenum, qui ad primam veniunt legum audientiam, perterriti ex primis eorum cunabulis inutiles legis antiquae dispositiones accipiunt. sed sit plenissimus et legitimus quisque dominus sive servi sui sive aliarum rerum ad se pertinentium."

[50] See Berger, "Encyclopedic Dictionary," s.vv. "In bonis esse" (495), "Ius Quiritium" (532), "Nuda proprietas" (601).

or give away small items and books (though permission of a superior was needed).[51] Now, he argued, to be able to do this sort of thing went rather beyond the normal definition of use:

> Quis enim nudum usuarium poterit dicere cui rem usuariam licet permutare, vendere ac donare? Procul dubio haec naturam usus noscuntur excedere, nec ad usuarium sed ad dominum potius pertinere. Haec evidenter arguunt talem usuarium minime fore nudum, quae quidem de rebus nonnullis mobilibus fratres ipsi faciunt, adserentes sibi per ordinationem huiusmodi hoc concessum.[52]

In other words, to say that this or that use is bare is meaningless if the use itself exhibits characteristics more closely associated with lords or owners than mere users.

Aside from the problem that the papal *retentio dominii* has allowed the friars to proclaim that they are the most perfect followers of Christ and the apostles, it has also caused problems within the order, and within the Church. As far as the Franciscans are concerned, John claimed that this so-called retention was dangerous for the brothers in that it has allowed schisms and harmful dangers to arise.[53] John perceived clearly that there was a link between poverty and the spiritual problem.[54] The Church itself suffers from all the litigation "for small and worthless things" in secular and ecclesiastical courts.[55]

In light of all these considerations, John closed *Ad conditorem*[1] with a bombshell. After careful thought he wrote:

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[51] *ACC*[1], 84. John's claims are very reminiscent of the extensive powers Martin IV granted the Franciscans in *Exultantes in Domino* (1283; in BF 3:501a–02a [no. 40]). The expanded powers were accepted by the order in 1285, a much different reaction than to *Quanto studiosius*, whose privileges were rejected twice (1251; 1260). Michael paraphrases these aspects of the bull (*App. maior*, 297), but apparently (and rather surprisingly) finds them to support entirely his version of Franciscan poverty. See Kriechbaum, Actio, ius *und* dominium, 25, who noted Michael's use of the passage (but the reference in the quotation is to Martin IV, not Nicholas IV), and Oakley, "John XXII," 49–50.

[52] *ACC*[1], 85: "For, who can call a person who is allowed to exchange, sell, and give away a usable thing a 'bare user'? Without doubt, these things are known to exceed the nature of use, and to pertain not to a user, but rather to a lord. Clearly, these things, which indeed the brothers themselves (who assert that this was granted them by such an ordination) do with many movable things, prove that such a user would hardly be a 'bare' one."

[53] *ACC*[1], 86.

[54] As Nold, *Pope John XXII*, 157, has noted; although he goes too far with the suggestion that John thought the problem had caused "schismatics" to arise (for *periculosa suborta fuerint schismata*).

[55] *ACC*[1], 86–87. Cf. Jacob, "Ockham," 91.

> Nos itaque … volentes tantis malis occurrere ac conscientiis et statui dictorum fratrum necnon et honori dictae Romanae Ecclesiae praelatorum quoque atque rectorum et aliorum indemnitatibus providere, de fratrum nostrorum consilio sacrosanctam Romanam Ecclesiam tam inutili tamque pernicioso dominio carere potius quam ipsum habere volentes, hoc edicto in perpetuum valituro censemus quod in bonis praedictis que in posterum conferuntur vel offeruntur vel quomodolibet aliter obvenire contigeret fratribus seu Ordini supra dictis, non plus iuris in illis Apostolica Sedes habeat nec in ipsis seu pro ipsis sibi dominium seu ius aliquod aliud adquiratur quam quod habet sibique adquiritur in bonis vel pro bonis quae fratribus aliorum mendicantium Ordinum quomodolibet adquiruntur.[56]

In one long and convoluted sentence, John forever changed the Franciscan *modus operandi*.[57] It fell *ad conditorem canonum* to make changes where changes were needed, and thus, if papal retention of ownership was the cause of so many problems, then it had to go. Patrick Nold has suggested that "*Ad Conditorem* in its original form is simply a list of harms done and a modest proposal to ameliorate them."[58] But if so, to some at least, it must have seemed a modest proposal of Swiftian proportions! [59]

## 3. *John Re-acts:* Ad conditorem canonum, redactio secunda *and Beyond*

With the publication of *Ad conditorem*[1], John's position in the controversy became firmly entrenched. In what follows, I shall present a synchronic account of John's theory of property as it can be found in *Ad conditorem*[2], *Cum inter*, *Quia quorundam*, and *Quia vir*. But before we move on to an

[56] *ACC*[1], 87: "And so, we … who wish to put a stop to such evils, and to provide for the consciences and status of the brothers, as well as the for honour of the prelates of the Roman Church, and even for the safeguarding of the rectors and other people, [and] who wish, according to the counsel of our brothers, that the most holy Roman Church lack rather than have the so very useless and pernicious lordship, we decree, by this perpetually valid edict, that the Apostolic See has no more right in the goods that are conferred in the future, or offerred, or in some way happen to come to the brothers or order; and lordship or some right is not acquired in them or for them by the Church other than what it has and has acquired in the goods or for the goods that are acquired in some way for the brothers of the other mendicant orders."

[57] So Gagnér, "Vorbemerkungen," 317, and Leff, *Heresy*, 164–65. Brunner, "Papal Interventions," 381, has argued that this represented a fundamental "constitutional change in the order," but we should note that this change, though momentous, did not affect the arrangement where the donor wished to retain his lordship of the donated goods.

[58] Nold, *Pope John XXII*, 152.

[59] Cf. Miethke, *Ockhams Weg*, 378–79.

appraisal of John's theory of lordship in general, it is worth describing briefly the content of each bull.[60]

Bonagratia appealed *Ad conditorem*[1] in Avignon on 14 January 1323.[61] Of significance was his claim that Nicholas III did not "innovate" in *Exiit*, since this would lead to the interesting parallel discussion about the (im)mutability of papal decrees.[62] John responded by imprisoning Bonagratia and with a longer version of *Ad conditorem* in the following days, although he dated it to the date of the first version.[63] In this version, John mainly amplified and strengthened his argument about consumables, and reiterated the fact that the Roman Church was no longer the nominal lord of Franciscan goods.[64] *Ad conditorem*[2] in some ways treaded more softly than the first version.[65] Almost a year later, John published his dogmatic decree *Cum inter* (12 November 1323). In what was probably a very carefully worded and re-worked bull,[66] John declared the following: (1) to say that Christ and the apostles practised "absolute" poverty (along Franciscan lines) is heretical; and (2) to say that they had absolutely no rights to the things they used is likewise heretical.[67] The pope clearly hoped to settle the issue once and for all,[68] but in response to appeals and attacks made against *Ad conditorem* and *Cum inter*, John had to re-clarify his position in *Quia quorundam* (10 November 1324). This is an interesting bull, which has generated its own storm of controversy, and which modern academics like to argue about almost as much as their medieval counterparts due to its discussion of the keys of

[60] Brunner, "Pope John XXII," 138–238, provides extensive and up to date analysis, and possesses the added virtue of being among the few studies that also fully engages with *QVR*. See now also Gonzales, "'King of the Locusts,'" and (with caution) Lee, "Roman Law and Human Liberty."

[61] See the summary in Miethke, *Ockhams Weg*, 379–83.

[62] *App. ACC*, 93: "Ex quibus [a brief run-through of earlier papal bulls] liquide patet quod … Nicolaus III, in … *Exiit qui seminat*, declarando res quibus dictae regulae professores utuntur et uti possunt ad se et ad Romanam Ecclesiam pertinere, rem non novam neque insolitam aggressus est, … nec per hoc novum aliquod ius statuit, sed quod erat detexit et in publicam notionem deduxit." I leave to one side the fascinating medieval debates concerning what we now call papal infallibility. Tierney, *Origins*, 171–237, examined this topic in the context of the Michaelist-John controversy, and in doing so he stirred up a great deal of controversy of his own.

[63] This is not the only bull John re-issued; see Tarrant, *Extravagantes*, 5.

[64] Duval-Arnould, "Les conseils," 193–94.

[65] Miethke, "Paradiesischer Zustand," 520.

[66] See Duval-Arnould, "La Constitution," 418–20, for a comparison of the "preparatory" and "definitive" versions of the bull. See also his later studies, "Les conseils," and "Élaboration."

[67] *CIN* 6–23 (255–57).

[68] Miethke, *Ockhams Weg*, 392.

power and authority, the reformability of papal decrees, and whether John was in fact altering *Exiit*. The pope insisted that his interpretation of *Exiit* was Nicholas's, but that he was no more bound to Nicholas's declaration than Nicholas was to those of his predecessors. Finally, he took the time to re-condemn the Franciscan position as heretical, and excommunicated those who supported it.[69]

Over the next several years, everyone weighed in with their own particular, if not wholly original contribution to the debate. Of particular significance were the longer and shorter Pisan appeals of Michael of Cesena, since the shorter appeal—not the longer one, as Michaelists were wont to point out whenever they could—served as the basis of John's longest contribution to the debate, *Quia vir reprobus* (16 November 1329). In this last bull, the pope re-iterated and (re-)re-clarified his position on nearly every point.

In the sections which follow, I shall present John's theory of property. Although John's basic position on the nature and extent of evangelical poverty can be understood in terms of his account of *usus* alone, because he was responding primarily to the Michaelist position, it is useful to frame his theory of use in terms of questions of law, rights, and property. I shall begin with his description of the types of law; following this, I shall describe his views on the origin of *dominium*; and finally, there follows a discussion of *usus*, and the pre-requisites for just and licit use.

## 4. *John and the Types of Law*

Despite the scant attention John devoted to the nature of law in general, from the remarks made in three sections of *Quia vir*, it is clear that he followed the traditional division into divine, natural, and positive law.[70] John studied and

[69] A text known as the *Concordia*, which was later incorporated into Alvarus Pelagius's *De planctu ecclesiae* 2.59, in de Meneses, *Estado e Pranto* 7:2–20, attempted to show the harmony of *CIN* and *Exiit*. See the discussion about authorship and dating in Oliger, "Tractatus de paupertate," 315–16, though a date between *CIN* and *QQM* does in fact seem reasonable. Throughout history people have tried to determine whether or not John contradicted Nicholas; Heft, "Popes in Contradiction?" discussed many of these attempts before offering his own: namely that John and Nicholas did contradict each other, but not on matters of dogma (254–57); cf. Callahan, "William Ockham and Natural Law," 63.

[70] *QVR*, 582, 590–91, and 592–93. As Pennington, *Prince and the Law*, 120, has pointed out that medieval jurists all admitted that divine law, natural law, and the *ius gentium* transcended positive law. See Brunner, "Pope John XXII," 222–24, for some discussion of the pope's views on divine and positive law.

taught both canon and civil law,[71] and as a canonist, he was well aware of the complex account of law in the first distinction of the *Decretum*; however, he made little use of most of these early chapters.[72] He referred to D. 1 c. 1 only once, and only to note how not everything permissible according to divine law is permissible according to human law.[73] The pope thus recognized that human (positive) law often has to allow or promote one action and forbid another, but that from the perspective of divine law, human law could have just as easily forbidden the one and permitted the other. A modern example would be declaring which side of the street one must drive on. Divine law makes no claims about the rightness of many actions that positive law has ruled on.[74]

John mostly avoided using *ius naturale* in his writings about Franciscan poverty, presumably because his theories had little need for it. In his only serious discussion of the term he described the "primordial natural law" as that which "omnibus animantibus est commune, cum illud ius nichil statuat, sed inclinat seu dirigit ad aliqua omnibus animantibus communia facienda."[75] The pope was attempting to cut short the idea that all things are common by natural law. According to John, the original (*primaevum*) natural law does not actually command anything at all, although it does suggest that some things ought to be common to all animals. As the next

[71] Weakland, "John XXII Before His Pontificate," 163–64.

[72] In fact, aside from D. 1 c. 1 and D. 8 c. 1, John never cited directly any of the other chapters of the first twenty distinctions (the so-called *Tractatus de legibus*), though (as noted by Offler) John probably recognized Michael's allusion to D. 19 c. 1 when he quoted him at *QVR*, 558 (see the *apparatus fontium* to *OND* 6.8–10 [1:355]). However, I cannot agree with Oakley, "John XXII," 226, who argued that John collapsed much of the distinction between natural and human law.

[73] *QVR*, 582–83. Cf. *Glos. ord.* ad D. 1 c. 1, s.v. "discrepant": "Non tamen sunt contrariae. Nam transire per agrum alienum diuina lex permittit: humana prohibet: sed prohibitio et permissio non sunt contrariae. Nam dominus permittit uxorem infidelem dimitti, apostolus prohibet: C. 28 q. 1 c. 8."

[74] This is not to say that positive law makes claims about the rightness of some action before the law is passed, only that *once* the law is passed, it does make a claim about which action is legally permitted, or 'right,' and which is not.

[75] *QVR*, 592–93: "Hence, it is clear that, [lordship was] not [introduced] by the primordial natural law, if it is posited for that law that is common to all animals, since that law establishes nothing, but inclines or directs for some things to be made common to all animals." This is a clear allusion to Dig. 1.1.1.3; cf. Weigand, *Die Naturrechtslehre*, 13, on Ulpian. In his gloss to Inst. 2.1.1 (s.v. "naturali iure"), Accursius also used the phrase *iure naturali primevo* (also discussed in ibid., 89), though the gloss was not one favourable to John's argument. See the discussion on p. 69, below.

chapter shall show, John chose to discuss natural law in only one of the many ways the term was used and understood over the previous two centuries.

One significant feature of *ius* in John's opinion, was that it was intimately connected to ideas about equity and justness.[76] While this is presumably a goal (if not a feature) of any and all theories of law,[77] particularly those which recognize some sort of objective source of law and morality, for the pope this meant not so much that a law needs to be just to be valid, but that an action cannot be just if it is not also legal. To take the example presented in D. 1 c. 1 again, John argued that Isidore did not accept *fas* (which the pope linked to divine law) as an intermediate category between just and unjust. While it might be *fas* to pass through another's field, it is not *ius*, which means, he explained, that it is not allowed "de iure humano."[78] It would seem, then, that "just" and "unjust" are primarily linked to *ius*, whether it be human or divine.

This will be clearer when we look at his theory of use more closely, but for now what is important is that, according to John, conformity to the law is what guarantees the justness of an action; and in certain cases, the law stipulates that the actor must have certain rights to the action in question (e.g., a *ius utendi*) for the action to be just. To do otherwise is to act illicitly, which means one would also be acting unjustly.

## 5. *The Origin of Property*

Given the pope's account of *ius*, it will not be surprising that John maintained that lordships had been historically established through divine and human law.[79] The source and origin of *all* lordship, however, is God. John cited *Quo*

[76] *QVR*, 593.

[77] See Dig. 1.1.1, and the glosses to "iuri" and "ars"; cf. Ullmann, "Baldus's Conception of Law," 388–92.

[78] *QVR*, 582–83: "Nec obstat, si dicatur quod immo Isidorus inter iustum et iniustum ponere medium fas videtur, dicens quod ire per agrum alienum fas est, ius non est. Isidorus enim diviserat legem in divinam et humanam, et imposuerat nomina istis legibus, dicens quod fas lex divina est; ius lex humana. Unde volens de his exemplum dare, subiunxit: Ire per agrum alienum fas est id est de iure divino licitum est; ius non est, id est de iure humano non licet, ut patet D. 1 c. 1. Non ergo voluit Isidorus inter iustum et iniustum fas pro medio ponere, sed declarare quod aliquid de iure divino licet quod de iure humano non licet."

[79] John cited C. 23 q. 7 c. 1 on this point: *QVR*, 592 and 593. Its rubric reads: "Res terrenae non nisi diuino uel humano iure tenentur." For a discussion of earlier juristic thought on the origin of property, see Weigand, *Die Naturrechtslehre*, 85–92, 307–35, and Tierney, *Idea of Natural Rights*, 131–48.

*iure* for support, easily one of the most important canons for late medieval discussions of property rights.[80] The argument is based on the division of divine and human law that Augustine outlined at the beginning of the *capitulum*, where it is said, wrote the pope, that "ius divinum est, quod in scripturis divinis habemus, humanum vero ius, quod in legibus regum."[81] John's literal interpretation of this claim allowed him to argue that since someone could say that something was his own before the time of kings, by divine law someone could say that something was his own.[82] Ignoring the preamble to *Quo iure*, where it is suggested that things are common to all by natural law, the pope argued that even in the state of innocence things were not always common to all. Before the fashioning of Eve, Adam alone had individual lordship of temporal things, for it could not be common (*commune*), since sharing (*communio*) requires a plurality.[83] Of course, once Eve had been created, the two exercised common lordship in the state of innocence. Based partly on the variant reading Augustine gives for Genesis 1:28,[84] the pope concluded that our first parents had lordship in the state of innocence.[85]

The other key capitulum of the *Decretum* on which the controversy turned was *Dilectissimis* (C. 12 q. 1 c. 2).[86] According to the Michaelists, *Dilectissimis*

[80] Other important canons of the *Decretum* for this question are D. 1 c. 7, D. 47 c. 8, and *Dilectissimis* (C. 12 q. 1 c. 2). The pope ignored the first two, but had a lot to say about the third; see *QVR*, 562, 564–65, 569, 570, 590, 593–94, 600, and 603–04.

[81] *QVR*, 590: "divine law is what we have in divine scriptures; human law, on the other hand, is what we have in the ordinances of kings." For the original text of Augustine, see his *In Ioannem Evangelium tractatus CXXIV* 6.25, in Willems, *Augustini in Iohannis Evangelium*, 66.

[82] *QVR*, 590–92.

[83] *QVR*, 591: "Videtur enim quod Adam in statu innocentiae, antequam Eva formaretur, solus dominium habuerit rerum temporalium. Commune enim dominium, cum solus esset, pro illo tempore habere non potuit, cum communio plures requirere dignoscatur." Cf. *QVR*, 569–70: "videtur quod ante formationem Evae dominium temporalium Adae proprium fuerit, non commune. Commune quidem esse non potuit, cum solus pro tempore illo fuerit, et respectu unius, qui nunquam alios socios habuit, nihil commune dici possit."

[84] The variant version reads "masculum et feminam creavit eos benedixitque illis Deus et ait crescite et multiplicamini et replete terram et subicite eam et dominamini piscibus maris et volatilibus caeli." John XXII apparently had the modern "subicite eam [terram]," but noted that Augustine, when quoting this verse, twice has "dominamini eius"; see *De civitate Dei* 14.21, in Dombart and Kalb, *Augustini de civitate Dei* 2:443, and *De Genesi ad litteram* 6.8.13, in Zycha, *Augustini de Genesi ad litteram,* [*etc.*], 179. Miethke, "Paradiesischer Zustand," 523, has pointed out the centrality of this passage for John's position.

[85] *QVR*, 569. Cf. Brunner, "Pope John XXII," 222–24.

[86] As the early part of this text is important for the ensuing discussion, I provide it here: "Communis uita, omnibus est necessaria, fratres, et maxime his, qui Deo inreprehensibiliter

proved that Adam and Eve had the use of things without lordship of temporal goods.[87] John, on the other hand, argued that, far from proving a lack of lordship in the state of innocence, this *capitulum* clearly showed that they did not have this lordship separately (*divisim*).[88] The pope was playing on the verb *dividere* and the example of the indivisibilty of air and sunlight to argue that lordship had to be common. It is similar in the case of temporal goods. According to John, if the giver and receiver are respectively able to give and receive, then lordship passes by the act of giving. Thus, when temporal goods are given by God "generally to all to have," the lordship is made humankind's.[89] The point, after all, was that God was giving these things 'to have,' not only to use.[90] It was only through sin, *per iniquitatem*, that this common lordship became divided. It was with this division, finally, that led to advent of someone calling something *suum*.[91]

According to the pope, temporal lordship first came into existence when Adam was alone in paradise. With the creation of Eve, the lordship became common,[92] but following the first sin, lordship began to be divided up. This

militare cupiunt, et uitam apostolorum eorumque discipulorum imitari uolunt. §. 1. Communis enim usus omnium, que sunt in hoc mundo, omnibus hominibus esse debuit. Sed per iniquitatem alius hoc dixit esse suum, et alius istud et sic inter mortales facta est diuisio. §. 2. Denique Grecorum quidam sapientissimus, hec ita esse sciens, communia debere, ait, esse amicorum omnia. In omnibus autem sunt sine dubio et coniuges. 'Et sicut non potest,' inquit, 'diuidi aer, neque splendor solis, ita nec reliqua, que communiter omnibus data sunt ad habendum, diuidi debere, sed habenda esse communia.' Unde et Dominus per Prophetam loquitur, dicens: 'Ecce quam bonum et quam iucundum, et reliqua.'" This passage was attributed to Clement I, but he did not write this exactly; for a short history of its composition, see Cohn, *Pursuit of the Millennium*, 193–95. For excerpts from some *Summae* and glosses on this text, see the appendix in Kuttner, "Gratian and Plato," 109–118.

[87] John was responding to the claims of Bonagratia, *De paup.*, 489 and 504, and the *App. minor*, 432–33, 435, and 445.

[88] *QVR*, 570–71. At *QVR*, 561, he defined *dividere* thus: "Dividere enim est divisim aliquibus diversas partes rei alicuius dare."

[89] *QVR*, 570: "Ex quibus verbis clare patet philosophum dixisse ista temporalia fuisse data communiter omnibus ad habendum. Et si data fuerint ab illo, qui dare potuit, utpote Deo, et ei, qui capax fuit, sicut homo, sequitur quod eorum dominium factum fuit." We might note that Huguccio held a similar opinion; see his *Summa decretorum* ad D. 1 c. 1, s.v. "alienum" (21): "Set nonne dare est dominium et proprietatem in aliquem transferre?"

[90] Töpfer, "Anschauungen," 299–300.

[91] *QVR*, 564, explaining *Dilectissimis*.

[92] One notable lapse in John's account, which Ockham will take him to task for is how this supposed individual lordship became common (see below, p. 163). Presumably, the lordship passed automatically because God gave 'generally' and Eve was automatically eligible to receive the goods in the same way Adam had been. But this would seem to beg the question Ockham asked.

account of the origin of lordship and ownership thus cuts out the idea of a propertyless natural state, which had long served as the ideal to which the early community of the apostles were thought to have attempted to return.[93] More important than this, though, was the nature of the poverty of Christ and the apostles. But as temporal lordship clearly already existed at this time, John focused his arguments mostly on the nature of use.[94] In fact, the pope's theory of use guaranteed that Christ and the apostles had property rights—unless, that is, one wanted to suggest that Christ and apostles used things illicitly and unjustly.

### 6. *The Legal Nature of Use*

It has often been noted that one of the chief characteristics of John's argument against the Michaelists lay in his determinedly legal definitions of *usus* and *uti*. To begin with the verb, the pope claimed that "uti re aliqua nichil sit aliud proprie quam fructus rei seu utilitatem aliam in solidum uel pro parte recipere, qui ex ea possunt salua rei substancia prouenire."[95] John's definition of the verb derived from his definition of the noun, though it takes him some time to articulate it clearly. In the second version of *Ad conditorem*, he maintained that,

> usus, qui eciam [like usufruct] personalis est seruitus, nichil sit aliud quam ius tantum utendi rebus alienis substancia salua rei, id est, ius percipiendi fructus et utilitatem aliam in totum uel pro parte suo nomine qui possunt ex re in qua usufructus seu usus constituitur prouenire.[96]

Use demands the preservation of the substance. Although John did not choose to reveal his source in *Ad conditorem*[2], he was simply expanding a

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[93] Oakley, "Franciscan Innocence," 220–23, has pointed out that the Franciscans attempted to return to the primeval 'state of innocence,' but the direct model was the early apostolic community which had 'renovated' that first state—and only as far as this was possible: there could be no full return. Cf. Baudry, "L'Ordre franciscain," 200, Lambertini, "Fragments," 194, and Tierney, *Idea of Natural Rights*, 162.

[94] I omit here discussion of the temporal reign of Christ (whether theoretical or actual) as it has little to do with John's theory of property. On this, however, one should see Lambertini, "'Il mio regno.'"

[95] *ACC*[2] 128–130 (239): "to use some thing is properly nothing other than than to receive the fruits of the thing or some utility, in whole or in part, which can come from it with the substance of the thing preserved." The definition is repeated at *QVR*, 578–79; significantly, this definition is wholly lacking in *ACC*[1].

[96] *ACC*[2] 108–111 (238): "Use, which is also a personal servitude, is nothing other than

little on Azo's gloss to "nudus usus," which stated that "usus est ius utendi alienis rebus, salva rerum substantia."[97] To put this gloss in its proper context, this particular passage of the *Digest* explained: "Constituitur etiam nudus usus, id est sine fructu: qui et ipse isdem modis constitui solet, quibus et usus fructus."[98] John was thus on solid ground for his claim that (proper and licit) use demanded a right of using, as usufruct clearly does.[99] Since this definition requires that the substance remain unimpaired, John argued that there can be no use, according to the proper sense of the term,[100] of anything consumable by use.

Even at this early stage we can see how closely John related use to right. Although John maintained this claim in *Quia vir*,[101] in a later chapter he drew a further distinction, which he clearly thought could lead to some confusion. "Aliud est enim," he said,

> alicui in usum rem aliquam dare, et aliud dare alicui usum alicuius rei. Ubi enim usus alicuius rei usibilis conceditur alicui, usus tantum rei, et non dominium sibi intelligitur esse datus; sed ubi alicui res datur in usum, nedum usus rei, sed et dominium intelligitur esse datum.[102]

There was, John thought, a difference between giving someone something "for use" (*in usum*) and giving someone "the use" (*usum*). That is, in the many scriptural examples—John cited Numbers 18:21[103]—where we read about

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merely the right of using another person's things, with the substance of the thing preserved; that is, the right of receiving in one's own name the fruits or some utility, in whole or in part, which can come from the thing in which the usufruct or use is established." *ACC*[1] again offered no clear account of the term.

[97] *Glos. ord.* ad Dig. 7.8.1.1, s.v. "etiam nudus usus": "Use is a right of using another person's things, with the substance of the things preserved." For Azo, see Kriechbaum, Actio, ius *und* dominium, 33–34.

[98] Dig. 7.8.1.1: "bare use, that is, without the fruit, is also established: it is also accustomed to be established in the same ways in which usufruct is established." Cf. Inst. 2.5 pr.

[99] Berger, "Encyclopedic Dictionary," s.v. "ususfructus" (755), but cf. the two different meanings of "usus" (754–55).

[100] *QVR*, 559: "primo quidem quia in rebus talibus, scilicet usu consumptibilibus, usus facti, sumendo usum proprie, locum habere non potest. Usus enim sumendo [*OND*: *sumptus*] proprie, requirit quod cum ipso usu substantia rei salva maneat, ut ex praedictis patet, quod in rebus usu consumtibilibus nequit esse." Cf. *QVR*, 580; see also Azo's remarks on p. 179 below.

[101] *QVR*, 555–56.

[102] *QVR*, 567: "It is one thing to give some thing, and another to give someone the use of some thing. For where the use of some usable thing is granted to someone, only the use of the thing, and not the lordship is understood to have been given to him; but where the thing is given to someone for use, not only the use of the thing, but even the lordship is understood to have been given." cf. *QVR*, 574.

[103] *QVR*, 567: "Dominus sic dicit filiis Levi: 'Dedi omnes decimas Israhel in possessionem

someone having or receiving (the use of) something, it was usually "for use," which means that they also had or received lordship as well.

In short, John might have been willing to agree that (in the case of non-consumables) the Franciscans had the use without the lordship—i.e., not *in usum*. They were not owners in the modern sense of the word. The friars could agree with John as far as it went. Unfortunately, it did not take them very far, for the pope went on to deny both that this use was without *all* rights, and that the distinction between *usus* and *in usum* could not hold in the case of consumables.

Before looking at the way John parsed *usus facti* and *usus iuris* it is important to highlight one of the most significant differences between John and his opponents, one which has, furthermore, rarely been mentioned. This difference has to do with the pope's separation of the *ius agendi* from the *ius utendi*. The nature and function of the *ius agendi* is crucial for an understanding of the two competing theories of lordship. As the subsequent chapters will show, the Franciscan dissidents assimilated the *ius agendi* to *usus iuris*; the latter, by definition, always included the former. John, on the other hand, maintained a sharp distinction between the two concepts. To have a right of using was not equivalent to having a right to action.[104] Although John never explicitly equated the terms, it seems clear that by *ius agendi* he was thinking of what textbooks on Roman law describe as an *actio*.[105]

That this is so can be seen where he classified usufruct as a personal servitude, which he then went on to compare with a definition of use. As he explained,

> usufructus prout est ius in re constitutus, qui seruitus dicitur personalis et pro quo reales competunt acciones, nichil sit aliud quam ius utendi fruendi….[106]

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pro ministerio quo serviunt mihi in tabernaculo foederis.'"

[104] *QVR*, 581.

[105] The explicit equation of *actio* and *ius agendi* seems to have first been made in the *App. minor*, 436–37. That John never complained about any terminological imprecision (as both sides were wont to do) suggests that he did not see any significant problems in doing so; at one point he even explained that "modus agendi pro istis rebus temporalibus in iudicio" simply meant "certa forma proponendi ius suum in iudicio." See *QVR*, 593. This seems to be the missing link between *actio*, and *ius agendi*, although Franciscan tracts often made similar claims about lordship and other lesser property rights being defensible in court. Cf. also what Azo said about *ius* being taken for a power on p. 74, below.

[106] *ACC*[2] 105–107 (237–38): "usufruct, just as it is established as a right in the thing, which is called a personal servitude, and for which real actions pertain, is nothing other than a right of usufruct." The sentence finishes with his definition of use; see the quotation on p. 47 above.

This is a classic definition of usufruct.[107] What we must note here is the point that "real actions" apply to things; hence John's claim that real actions pertain to usufruct. That is, the usufructuary has an *actio* with respect to the thing over which he has usufruct.[108] A real action indicates that the relationship being urged is between a person and a thing rather than person and person; a real action is when someone is making a claim *in rem*. Thus John was saying that the kind of claim one urges when it comes to usufruct is a *realis actio*. The situation is completely different with the *ius utendi*. John argued that real actions do not pertain to a right of using because that right "nec est ius in re, nec seruitus personalis, sed mere ius personale."[109] A right of using cannot be a servitude because it is an incorporeal thing,[110] whereas a personal servitude such as usufruct "featured a vesting of all or part of the beneficial interest of the right of ownership in a person other than the owner, the right being personal to that person and so inalienable."[111] *Usus*, a personal servitude, and *ius utendi*, a personal right, were not quite the same thing.

It was surely a fine distinction that John drew, but it was a step on the path towards arguing that a use to which a *ius utendi* belongs is different than a *ius agendi* for the simple reason that one might have a right of using and yet not have a right to take action.[112] This time the two terms were wholly separate. At the simplest level one, the *ius utendi*, was an abstract right which existed as a relationship between people, while the other, the *ius agendi*, expressed the type of claim (*actio*) being pressed.

The reason John argued that they were two different things is because they had to be in some cases. The right of using is an arrangement that occurs when, say, Paul grants Ulpian the right to the use of some thing (*res*). In this case the right inheres in the person (*in persona*) to whom the right

[107] Cf. *Glos. ord.* ad rubr. Inst. 2.4, s.v. "Ususfructus": "Et quod haec definitio bona sit, patet tali ratione: ususfructus est ius: id est seruitus constituta in corpore: quo corpore sublato, et ipsum usumfructum tolli necesse est."

[108] For what follows, I am indebted to Metzger, "Actions," 217–20.

[109] *ACC*[2] 120–121 (239): "is neither a right in the thing, nor a personal servitude, but only a personal right." Cf. Dig. 8.1.1: "Servitutes aut personarum sunt, ut usus et usus fructus, aut rerum, ut servitutes rusticorum praediorum et urbanorum."

[110] See especially *Glos. ord.* ad Inst. 2.2.2, s.v. "Quae in iure consistunt" and *Glos. ord.* ad Inst. 2.2.3, s.v. "iura."

[111] Miller, "Property," 66. See also Berger, "Encyclopedic Dictionary," s.vv. "usus iuris" (637), "possessio iuris" (753), "usucapio servitutis" (755).

[112] *QVR*, 581: "Ad hoc dicimus quod dicta constitutio [*Ad conditorem*] aperte et expresse loquitur de usu pro quo competit ius utendi, quod est aliud a iure agendi. Potest enim alicui competere ius utendi, cui non competit ius agendi."

is granted, not in the thing as it would in usufruct. Now if, say, the use of the *res* is obstructed by a third party, the action which must be pressed to recover the *res* has to be an *in rem* claim, a real action. But obviously, all Ulpian has is a personal right of using, no actual right to the *res*. Instead it is up to the owner, Paul, who does have a right in the *res*, to press the claim.

A charitable interpretation of John's theory of property rights would be that he was trying to preserve the spirit of much of the Franciscans' desire to be as 'rightless' as possible, for one of the big concerns everyone had with the order was the amount of litigation its members seemed to be involved in. The brothers themselves argued that they should engage in none (or, failing that, as little as possible), and those outside the order regularly complained that they engaged in far too much of it for a mendicant order. John's separation of these two so-called rights explained that while they had to have a *ius utendi*, this did not mean they had a *ius agendi*. They may have to have a right of using, but that does not mean that they could necessarily defend any of the property they used in court.

### 6.1. *Use of Fact or Use of Right?*

Of course, John did not stop there, which makes us suspect that he was more concerned with describing the mechanisms of use and ownership than avoiding stepping on a few toes. Thus John also creatively interpreted the traditional Franciscan claim that they only had simple use of fact. *Exiit* seemed to make a distinction between use of fact and right of using, but then went on to make the negative claim that absolutely no *professio* can do without the "use of necessary sustenance," and that it was fitting for the Franciscans to abdicate lordship and be content with an *usus necessarius* of the things granted them.[113] According to John's exposition of this point, *Exiit* clearly must have granted the order a use of right.[114] The pope's argument is essentially a negative one. He first of all argued that Gregory IX (r. 1227–1241), Innocent IV (r. 1243–1254), and Alexander IV (r. 1254–1261) all

[113] *Exiit*, 2:1113: "nam cum in rebus temporalibus sit considerare precipuum proprietatem, possessionem, usum fructum, jus utendi et simplicem facti usum, et ultimo tanquam necessario egeat, licet primis carere possit vita mortalium, nulla prorsus potest esse professio, que a se usum necessarie sustentationis excludat, verum condecens fuit ei professioni, que sponte devovit Christum pauperem in tanta paupertate sectari, omnium abdicare dominium et rerum sibi concessarum necessario usu fore contentam." See Lambertini, *Apologia e crescita*, 176–81, for discussion.

[114] As he succinctly put it at *QVR*, 580: "Dicimus quod per verba illa non concessit fratribus simplicem usum facti, immo hoc ipso quod ipsis usum concessit, si concessio valuit, ipsis ius utendi concessit, et sic in illis non habent simplicem usum facti."

must have meant that the Franciscan order had use of right for what they were permitted to have.[115] In 1230, for instance, Gregory granted the use of utensils, books, and movable goods with the caveat that they are the sort of things which are licit for the order to have; and Innocent IV in 1245 (Alexander IV republished the bull during his pontificate) repeated the claim in *Ordinem vestrum*.[116] This use cannot be a use of fact, however, for,

> Facta quidem que singulorum sunt personam ueram exigunt et requirunt; ordo autem uera persona non est sed representata et imaginaria potius est censenda. Quare que facti sunt sibi uere conuenire nequeunt, licet ei possint congruere que sunt iuris.[117]

In other words, when popes like Gregory IX and Innocent IV said that "ordo habeat usum,"[118] they had to mean an *usus iuris*. Orders are legal entities and as such they do not perform actions in the sense that a real person does. Thus any so-called use of fact—a concept John found troublesome at best—cannot belong to a corporate entity like a religious order. John thought his position was self-evident: "immo per eas [*Quo elongati* and *Ordinem vestrum*] euidenter ostenditur eorum que habere licet ipsis fratribus usum iuris ad ipsum ordinem pertinere."[119]

This seems a defensible claim, but it is important to realize that John was trading on a very specific reading of *factum*. Able lawyer that he was, John refused in this case to understand 'fact' as anything other than an act or a deed, even though it was not uncommon to use the word to mark a distinction from *ius*. (The Michaelists were unimpressed.) That is, in legal discourse, it was not uncommon to draw a distinction between the realms of

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[115] *QQM* 101–122 (266–67). The topic also comes up again in chapter seven.

[116] The texts are compared below, on p. 256.

[117] *QQM* 119–121 (267): "Facts, indeed, which are of individuals, demand and require a true person; now an order is not a true person, but is, rather, to be considered represented and imaginary. Wherefore, what are of fact cannot truly belong to it, although what are of right can suit it." Cf. *QVR*, 558 and 581. See especially Miethke, *Ockhams Weg*, 502–16, and Kriechbaum, Actio, ius *und* dominium, 54–76; cf. Baudry, "Le philosophe et le politique," 213. Heft, *Papal Teaching Authority*, 72–73, has missed the point here: even Christ needed more than just simple use of fact.

[118] Greogory IX, *Quo elongati* 77–91 (22–23); Innocent IV, *Ordinem vestrum* (BF 1:401a [no. 114]).

[119] *QQM* 104–105 (266): "rather, through them, it is clearly shown that, of the things which the brothers are allowed to have, a use of right pertains to the order." Cf. *QQM* 209–216 (274–75). Brunner, "Pope John XXII," 233–34, has offered the intriguing suggestion that John may also have been influenced by his experiences at the law school of Orléans on this whole topic. On this school see briefly Stein, *Roman Law*, 67–68.

'fact' and 'law';[120] we need only think of the phrases "de facto" and "de iure" to see how this distinction still holds today. Hence the pope was trading on a very specific reading of *factum* when he came to explain what Nicholas III had meant when he granted the order "usus facti."

Furthermore, John noted, Nicholas III equated the life of the Franciscans with that of Christ and the apostles,[121] but he never spoke about simple use of fact in connection with them.[122] In fact, John argued that the opposite had to be the case since the alternative would involve a contradiction. What had happened, in essence, was that Nicholas had followed Bonaventure's arguments against the standard objection that Christ is said to have had a purse.[123] In this case, the Franciscan reply was to say that this was an act of condescension on Christ's part for the infirmities of the imperfect. But if this is so, John wondered, then how can it be said that Christ and the apostles only had simple use of fact? Obviously more was involved.

John doubted that it would even be fitting for the perfect to have simple use of fact,[124] but a more pressing problem was that the terminology itself

[120] Berger, "Encyclopedic Dictionary," s.v. "factum" (466); for specific examples of the *factum* / *ius* distinction, see "error" and "error facti" (456), and "formula in ius conceptus" (475). Ockham, it should be noted, did draw this distinction: *OND* 2.149–154 (1:302).

[121] There is a serious discrepancy between what we read in the Friedberg edition of *Exiit* (2:1110), which, as its apparatus makes clear, is in essential agreement with the text in Sbarlea and Eubel (BF 3:404b–416b [no. 127], here 405a), and John's quotation as it appears in Tarrant's (268, ll. 124–126) or Friedberg's own edition (2:1232, ll. 40–43) edition. As the comparison makes clear, *QQM* is defective. In what follows, I give both texts minus their punctuation. The "⟨et⟩" marks a word in Friedberg's version (l. 43) which is not found in Tarrant; the "BF:" marks where the BF text differs.

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|---|---|
| Hii sunt illi sancte regule professores qui euangelico fundantur eloquio uite Christi roborantur exemplo fundatorumque militantis ecclesie apostolorum eius sermonibus ⟨et⟩ actibus firmatur. (*QQM* 124–126 [268]) | Hi sunt illi [BF: illius] sanctae regulae professores *quae* euangelico *fundatur* eloquio vitae Christi roboratur exemplo *fundatoris* [BF: fundatorum] militantis ecclesiae Apostolorum eius sermonibus actibus*que* firmatur. (*Exiit*, 2:1110; cf. G&F, 163) |

The problem clearly lies with the verbs (cf. Tarrant's apparatus for variants). In Tarrant's and Friedberg's text of *QQM* it is the *professores* who are "founded" and "strengthened," but then they should also be "confirmed" as well (for what else should serve as subject following the "-que"?). On the other hand, our uncritical texts all produce understandable results: it is the Rule that is the subject of all three verbs. Aside from being in agreement with the text of *Exiit*, this reading is also more in tune with general Franciscan apologetics.

[122] *QQM* 124–155 (268–70).

[123] As William of Saint-Amour put it some seventy years earlier, "Sed quod [Christ] mendicaverit panem, non lego; sed quod loculos habebat"; see Traver, "Two Disputed Questions," 330. A similar point is made in William's *De periculis*; see Geltner, *De periculis*, 98.

[124] *QQM* 159–174 (270–71).

was flawed. What people should really be speaking about, and in fact were actually speaking about whether or not they realized it, was 'ab-use,' which he took to mean a use which consumed the thing in question.[125] Use, he thought, implied that the substance would be preserved.[126] When pressed, the pope pointed out that this was a customary way of speaking in the Roman law tradition.[127]

In fact, for consumables, *res usu consumptibiles*, defining use as a right of using which must yet preserve the substance means that, technically, they cannot be used, only *ab*-used, or consumed.[128] The use of the prefix *ab* is meant to indicate this very fact: a preposition, he wrote, is accustomed to augment or weaken the sense of a word (*sensum dictionis*).[129] This claim derived, not surprisingly, from Azo again: after defining "nudus usus," he wrote that "usus non potest esse proprie" in consumables, much like usufruct.[130] Under Roman law, this right, a *ius abutendi* as John called it, was tantamount to a claim of ownership.[131] It is quite clear that John had a civilian's under-

[125] *ACC*$^2$ 145–147 (241): "Abuti autem, dum tractatur de rebus usu consumptibilibus, pro rei consumpcione sumitur quod ei opponitur quod est uti."

[126] *QVR*, 575: "Item, nec quisquam uti talibus rebus potest, sumendo proprie uti. Usus enim seu uti, si sumatur proprie, secundum leges requirit quod ex re illa in qua usum habere se asserit vel ea vult uti possit fructus vel utilitatem aliam assequi, substantia salva rei, quod non potest in rebus usu consumptibilibus reperiri."

[127] *QVR*, 576–78, citing especially the *Gl. ord. sup. rubr. ad* Dig. 7.5 s.v. "consumuntur," Dig. 7.5.5.1–2, and 12.2.11.2.

[128] *QVR*, 578: "Ex quibus [Dig. 7.5.5.1–2, and 12.2.11.2] patet quod legislatores loquentes proprie de rebus quae usu consumuntur, negant usum in illis locum habere, et abusum locum habere concedunt. Quod [*OND* & *Improbatio*: Qui] quidem abusus, id est rei consumptio, si fiat ab eo cui ius abutendi, id est consumendi competit, erit licitus; si vero ab eo, cui ius non competit, illicitus est censendus." Cf. *QVR*, 572. Mäkinen, *Property Rights*, 164–70, presented a different account John's understanding of consumables, but her analysis stopped short of *QVR*, which provides important clarifications. For the use of *abuti* in the *Digest*, see Garnsey, *Thinking about Property*, 188.

[129] *QVR*, 578.

[130] *Glos. ord.* ad Dig. 7.8.1.1, s.v. "etiam nudus usus." See p. 179, below, for the quotation and Michael's discussion of this passage. John clearly ignored the last bit of this gloss.

[131] *QVR*, 575–76: "consumptio tamen et actus consumendi locum habet, ut dicit constitutio praedicta, quae tamen non possunt dici simplicia nec a rei quae consumitur dominio separata, cum ipsa rei consumptione eius dominium pereat et prorsus esse desinat.… 'Ex quo patet quod usus talis, nec simplex nec separatus a dominio dici potest.' Et hoc patet, cum per talem facti usum proprietas et dominium ipsius rei perire noscitur." *OND* 41.12 (2:522) has the better reading with *noscatur*; I have also marked the quotation of *ACC*$^2$ 208–215 (246–47). As Kilcullen, "Origin of Property" 891 n. 43, has noted, Aquinas may be another source for this idea; in *STh* 2a2ae.78.1 co. (9:155), e.g., he claimed that when use of consumables is granted, the thing itself is granted—and thus in a loan (*mutuum*) the *dominium* itself is transferred.

standing of ownership, which in its essence, equated *dominium* with the rights to use (*usus*), the rights to fruits (*fructus*), and the right of disposal (*abusus*),[132] what we might today call the right to the capital.[133]

At the same time, however, John had to contend with the Michaelist position, which interpreted the distinction between *factum* and *ius* as meaning that a use 'of fact' referred only to the factual act independent of its juridical status. The pope generally equated the act of using (*actus utendi*) with the verb to use (*uti*), but the force of the definition flowed the other way: the definition of 'to use' was derived from 'use,'[134] and later in the same section, "using itself" (*ipsum uti*) is equated with the act of using.

> Quod autem ipsum uti ab aliquo haberi nequeat, dicta constitutio (sequens Augustini sententiam, positam in libro *Confessionum*) clare probat, quia quod non est, haberi nequaquam potest.[135] Actus autem utendi in rerum natura non est, nec antequam quis utatur nec postquam usus est, nec dum est in actu utendi, prout latius prosequitur dicta constitutio. Quare relinquitur quod haberi non possit.[136]

As the above quotation shows, John felt that the actual act of using is inextricably bound up with a somewhat Augustinian notion of time. Yet instead of serving as some sort of meditative aporia,[137] in John's hands the problems associated with explaining what time is serve to prove that the act of using cannot exist in the perpetually vanishing present moment. As John pointed out, "Patet autem quod actus ipse antequam exerceatur aut eciam dum exercetur aut postquam perfectus est in rerum natura non est."[138] To explain

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[132] Miller, "Property," 45, but note that this tripartite division is at odds with John's tacit connection of a *ius utendi* to a "ius percipiendi fructus et utilitatem aliam" (quoted on p. 47 above).

[133] See above, p. 26.

[134] *ACC*[2] 108–111 (238), and *QVR*, 555–56; see p. 47, above.

[135] This is not exactly what Augustine said, and the context is quite different; cf. *Confessiones* 11.16.21 and 11.21.27, in O'Donnell, *Augustine: Confessions* 1:156–58. Ockham pointed this out at *OND* 3.672–676 (1:328).

[136] *QVR*, 556: "Now the said constitution (following the opinion of Augustine included in the book of *Confessions*) clearly proves that the using itself cannot be had by anyone: for what does not exist, cannot be had. But the act of using does not exist in reality, not before someone uses, not after he has used, and not while he engages in the act of using, just as the said constitution shows more broadly. Wherefore, it remains that it cannot be had."

[137] Augustine, *Confessiones* 11.14.17 (1:154): "quid est ergo tempus? Si nemo ex me quaerat, scio; si quaerenti explicare velim, nescio." See Stock, *Augustine the Reader*, 235–40.

[138] *ACC*[2] 172–174 (243): "It is clear, however, that the act itself, before it is done, or even while it is being done, or after it is completed, does not really exist."

the surprising argument that the act does not exist while it is being done (*in fieri*), John wrote that,

> Quod autem in presenti fit momentaneum seu instantaneum est, quod utique magis intellectu quam sensu percipi potest, unde nec est haberi pro tunc nisi pro momento illo seu instanti in quo sic potest dici actum. Post actum completum, licet si ex facto ipso producta res aliqua fuerit, res ipsa facta haberi ualeat, factum tamen ipsum quod iam transiit nisi in memoria prout supradictum est non habetur.[139]

The pope perhaps recognized how abstruse this might seem because he tried to clarify his point in the *Quia vir*. Certain types of consumables are not (more or less) immediately consumable the way, say, a grain of salt is. Clothes, for example, wear out over extended periods of time. John therefore explained that he was really only talking about the "completed" (*perfectus*) act, and then only according to the discussion in the *Appellatio minor*.[140] As is clear from the exposition just given, John's argument is far from complete, but the upshot seems to be that he thought the act of using cannot be "had" (*haberi*) because the present is eternally ungraspable; and once the act is completed, it is too late for the act to be "had" (though its fruits are available).[141]

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[139] *ACC*$^2$ 182–187 (244–45): "Now, what happens in the present is momentary or instantaneous, which certainly can be perceived by the intellect more than by the senses; hence, it is not held at that time except for that moment or instant in which it can so be called an act. After the act is completed, if some thing will have been produced from the act, the produced thing can itself be held, but the fact itself, which has already passed, is not held, except in the memory, as it was said above."

[140] *QVR*, 584–85: "sed intellexit [*Ad conditorem*$^2$] et evidenter expressit quod per usum [*read:* actum] utendi perfectum, per quem res dicuntur usu consumptibiles, consumantur. Dixit enim quod per talem usum, id est utendi actum, et in ipso actu [*add:* et cum ipso actu], res huiusmodi consumitur. Posuit enim copulative 'utendi actum, et in ipso actu et cum ipso actu,' unde satis expressit quod non per ipsius actus principium consumantur res huiusmodi, sed per actum perfectum. Item, subiunxit quod actus utendi in ipsius rei, scilicet consumptibilis usu, exerceatur substantia, nec sine ipsius rei consumptione esse valeat usus talis. Unde cum dicat quod sine rei consumptione esse non valeat usus talis, satis evidenter expressit quod de usu illo per quem res consumitur, non de eius principio, intellexit." The suggestions in square brackets come from *OND* 73.3–12 (2:599–600); *Improbatio* 791 (352), only agrees with *OND* in the second case.

[141] The same reasoning applies for *concedere actum utendi* (here "act of using" is understood to be synonymous with the Michaelist *usus facti*); see *ACC*$^2$ 153–167 (241–43). As Kriechbaum, Actio, ius *und* dominium, 54–55, astutely pointed out, the owner cannot grant the act of using, only the possibility of using (licitly), which is what the *ius utendi* is. Kriechbaum pointed to Dig. 50.17.54 and, less convincingly, to *STh* 1a.75.1 obj. 1 (5:194).

So went John's arguments against the term *usus* and its obtainability. The problem, of course, was that many people could and did argue that the primary meaning of *abusus* and *abuti* was negative in the sense of 'abuse.'[142] For his part, the pope was convinced by the very fact that "abuse" is used in "the law of emperors" (i.e., Roman law) that the term can be used in a good, or positive, sense. Moreover, he added, the verb *abuti* appears in a passage of Jeremiah (18:23) as well; and "since 'abuse' taken in a bad way does fall on God", *abuti* must be taken for a licit act, not an illicit one.[143]

This final point introduced the transition to one of John's main, and certainly one of the most well known, criticisms of the Franciscan position, and it is to this that we must now turn.

### 6.2. *Just Use Is Licit Use Is Using by Right*

As we have seen, the use which the Franciscans have must be a use of right; that is, the order must have a use of right, and individual friars must have at least a right of using all things which they in fact use or consume. In the case of consumables, this right of using cannot be had separately: what is in fact required are the rights of *dominium*.[144] The reason for this is that since a right of using is inseparable from use itself,[145] any use—to use the word "improperly"[146]—must itself be just. According to the pope, *usus* without *ius* would be *iniustus*.[147] John in fact argued from the licitness of an act to the justness of an act, and, not surprisingly, John thought that *Exiit* made the point for him:[148]

> Quod autem usum talem non iustum conditor canonis fratribus ipsis non

[142] Cf., e.g., Berger, "Encyclopedic Dictionary," s.v. "abuti" (349).

[143] *QVR*, 578.

[144] *ACC*[1], 85; *ACC*[2] 86–88 (236). Cf. the *nova oppositio* from the consistory debates edited in Tocco, *La Quistione*, 81–82.

[145] *ACC*[2] 158–167 (242–43).

[146] See p. 48 n. 100, above.

[147] *QQM* 221–224 (275–76). Cf. McGrade, *Political Thought*, 11 n. 35. Unjust acts, of course, can hardly pertain to the state of perfection: *QQM* 224–226 (276).

[148] The relevant passage of *Exiit*, 2:1114, is as follows: "omnium utensilium et librorum, ac eorum mobilium praesentium et futurorum, quae et quorum usumfructum [*read:* usum facti] scilicet ordinibus [*read:* ordini], vel fratribus ipsis licet habere, proprietatem et dominium, quod et felicis recordationis Innocentius Papa IV. predecessor noster fecisse dignoscitur, in nos et Romanam ecclesiam plene et libere pertinere hac praesenti constitutione in perpetuum valitura sancimus." The words in square brackets represent the text of BF 3:409a (no. 127), which clearly offers the better reading.

> [*omit:* non] intellexerit[149] reseruare probabile non uidetur. Immo, quod de iusto intellexerit ex eo potest euidentius apparere quod in eadem ordinatione adiecit, quod illarum rerum dumtaxat in se et etiam Romam ecclesiam recipiebat dominium quare [*read:* quarum][150] usum facti liceret habere fratribus seu ordini antedictis, subiungens quod non rerum omnium usum habere debeant fratres ipsi. Quantum autem ad usum facti simplicem absque omni iure utendi attinet, nulla rerum potest censeri differentia quo ad fratres. Sic enim uti de facto possunt prohibitis ut permissis. Ex quo sequitur quod usus facti, de quo ordinatio loquitur, de tali intelligi debeat qui iustus sit et pro quo competat ius utendi. Et ipse uidetur conditor canonis ex eo etiam sensisse, quod in eadem ordinatione subiunxit quod moderatus usus in expressis prius rebus ipsis fratribus est concessus.[151]

There are a few things to note in this passage. First of all, although John could conceive of a de facto use which is without a right of using (for this is to use "forbidden" things) he refused to relate this notion to simple use of fact, which, we remember, had to be understood only as the completed act, not the act of using. In reality, as far as the friars are concerned, there is no difference when it comes to use. John was arguing in other words for an equation of just use and licit use, for he began by agreeing that Nicholas III wished to reserve a just use to the friars, but that he also circumscribed what was allowed to be used. Licit use came from the point that only certain things were permitted for use. Since it is wrong to use things that are not permitted, any such acts of using cannot be just. Conversely, therefore, licit use, or using

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[149] As Tarrant's second *apparatus lectionum* makes clear, the so-called official version of the bull does not have the *non* (the same is true for G&F, 166, and Heft, *Papal Teaching Authority*, 243); cf. CICan. 2:1234. Obviously, a double negative would negate the point John was trying to make.

[150] The same holds here as in the note above, but, even more importantly, her text ignores the fact that this is an essentially verbatim quotation of *ACC*[2] 194–204 (245–46), which reads "quarum." G&F, 166, and Heft, *Papal Teaching Authority*, 243, both read "quarum" as well; cf. CICan. 2:1234.

[151] *QQM* 227–236 (276–78): "But it does not seem probable that the establisher of the canon meant to reserve such a non-just use for the brothers. Rather, it can more clearly appear that he understood it about a just use from this: that he added in the same decree that he received in himself and in the Roman Church precisely the lordship of those things of which the brothers or the order were allowed to have a use of fact—adding that the brothers must not have the use of all things. Now, regarding a simple use of fact without any right of using, no difference of things can be supposed as far as the brothers are concerned. For they can, de facto, use prohibited things just as they can use permitted things. Hence it follows that the use of fact that the decree speaks of ought to be understood of such a use that is just, and to which a right of using belongs. And it seems that the establisher of the canon had also thought this because he added in the same decree that a moderate use was granted to the brothers in the things mentioned earlier."

what is permitted, must also be just use. Just use, however, presupposed a right of using: "Impossibile enim est actum humanum extrinsecum esse iustum, si exercens actum ipsum nullum ius habeat illum exercendi, immo non iustus seu iniustus necessario conuincitur talis usus."[152] Since just use (he argued) presupposes a right of using, then truly licit use must also involve a right of using. There is in this passage, as Virpi Mäkinen has noted, a shift from "not just" to "unjust" that John had no real grounds to make.[153]

The connection between licit use and just use holds even in cases where the owner has granted the would-be user a licence of using. As John explained, "Si enim aliquis licentiam concedat alicui utendi re sua usibili, ita quod licentia teneat, constat quod iste habet ius utendi re illa cui licentia est concessa."[154] This connection is explained by the fact that John posited an absolute dichotomy between just and unjust acts, which was fundamental to his whole position in the poverty controversy. This was in fact the second point of *Cum inter*: the pope declared that the assertion Christ and the apostles had no right of using the things they did was heretical because (*cum*) "talis assertio ipsorum usum et gesta euidenter includat in premissis non iusta."[155] Thus, in response to Michael of Cesena's claim that a licence is different from a right, John countered by asking whether this licenced use was supposed to be just, unjust, or neither:

> Si dicat quod iniuste, concordat utique cum constitutione praedicta quae vult quod qui sine iure utitur, utatur iniuste. Si dicat quod iuste utitur, sequitur per consequens quod et iure, quia quod iuste fit et fit iure, X 5.40.12; C. 14 q. 4 c. 11. Si autem dicat quod ille, cui est licentia utendi concessa nec iuste utatur nec iniuste, hoc falsum est. Impossibile est enim actum humanum individualem indifferentem esse, id est nec bonum nec malum, nec iustum nec iniustum. Cum enim actus humanus dicatur qui ex deliberata voluntate procedit, et per consequens qui fit propter aliquem finem, quiquidem [*sic*] obiectum noscitur voluntatis, oportet quod si finis actus sit bonus quod et actus ipse sit bonus, si vero finis sit malus, oportet quod actus sit malus.[156]

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[152] *QQM* 271–273 (279–80): "For it is impossible for an exterior human action to be just if the one performing that act were to have no right of performing it [reading *illum* for *illud*; cf. G&F, 168 and *Improbatio* 724 (330)]; rather such a use would necessarily be proven to be non-just or unjust." See also *ACC*[2] 188–192 (245), and *QQM* 224–226 (276).

[153] Mäkinen, "Franciscan Background," 173–74.

[154] *QVR*, 582: "For, if someone grants a licence of using his own usable thing to another, such that he holds it by means of the licence, it is agreed that he (to whom the licence was granted) has a right of using that thing."

[155] *CIN* 14–23 (256–57): "because such an assertion clearly describes in the aforesaid their [Christ and the apostles'] use and deeds of them [Christ and the apostles] as not-just."

[156] *QVR*, 582: "If he says that [he uses] unjustly, it certainly is in agreement with the

Since there are no indifferent actions, it is possible to say that every act is just or unjust in so far as each is good or bad. As others have noted, there are precedents for some of these ideas, both among theologians and jurists. In theological circles, there was a tendency to stress that just use was intimately connected to possessing a *ius*,[157] or that human acts are good or bad according to the deliberative *ratio* from which they proceed.[158] Jurists could make similar claims. Kriechbaum has noted that it was current among civilian jurists (*in der Legistik*) to posit *ius* and *iustitia* as two sides of the same coin, or at least more common than among the canonists, despite the apparent connection made between *ius* and *iustum* at D. 1 c. 2.[159] This seems borne out by the independent researches of Tierney, who has argued that John seems to have interpreted X 5.40.12 somewhat contrary to the prevailing canonistic tradition.[160] Clearly, there may well have been precedents that the pope felt could serve as solid foundations to his own argument. Yet, as was often the

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aforesaid constitution, which claims that he who uses without a right, uses unjustly. If he says that he uses justly, it follows consequently that he does so by right, because what is done justly is also done by right: X 5.40.12 and C. 14 q. 4 c. 11. However, if he says that he to whom a licence of using was granted uses neither justly nor unjustly, this is false. For it is impossible that an individual human act be indifferent, that is, neither good nor evil, neither just nor unjust. For since it is called a human act that proceeds from a deliberate will, and, consequently, which happens for the sake of some end, which indeed is known as the object of the will, it is necessary that the act itself is good if the end of the act is good; however, if the end is evil, it is necessary that the act be evil." See *ACC*$^2$ 188–192 (245) for a similar point about simple use without a right of using. For Michael, see *App. maior*, 264, *App. minor*, 438 and the discussion on p. 184, below.

[157] Brett, *Liberty, Right and Nature*, 54–56, has suggested that John derived (but developed) this argument from Hervaeus Natalis, *De paup.*, 235, who had argued that just use requires "aliquod ius in tali re." Cf. Tabarroni, Paupertas Christi, 79–80 n. 12, and Tierney, *Idea of Natural Rights*, 104–08. Mäkinen, *Property Rights*, 133, has identified a similar argument in Gregory of Fontaines's works.

[158] Offler has suggested (OPol 2:557) we compare *STh* 2a2ae.18.9 co. (6:137): "Et oportet quod quilibet individualis actus habeat aliquam circumstantiam per quam trahatur ad bonum vel malum, ad minus ex parte intentionis finis. Cum enim rationis sit ordinare, actus a ratione deliberativa procedens, si non sit ad debitum finem ordinatus, ex hoc ipso repugnat rationi, et habet rationem mali. Si vero ordinetur ad debitum finem, convenit cum ordine rationis, unde habet rationem boni. Necesse est autem quod vel ordinetur, vel non ordinetur ad debitum finem. Unde necesse est omnem actum hominis a deliberativa ratione procedentem, in individuo consideratum, bonum esse vel malum."

[159] Kriechbaum, Actio, ius *und* dominium, 60–61. D. 1 c. 2 reads: "Ius autem est dictum, quia iustum est." The *Glossa ordinaria* elaborates on this passage; see p. 97, below.

[160] Tierney, "*Ius dictum est a iure possidendo*," and *Idea of Natural Rights*, 124–26. But compare Rufinus, *Summa decretorum* ad D. 8 d.a.c. 1, s.v. "Differt quoque" (21; discussed on p. 87, below).

case, he did not name any authorities for his argument, preferring instead to construct a syllogism of his own. What is unjust cannot be licit, and since just use requires a right of using, so too must licit use; and, therefore, so too must licensed use. The way John saw it, when a friar used something, be it a stick found in the wilderness or the Basilica of St Francis, he either had the right to do so, or he used it unjustly and wrongly—like a thief.

### 7. *A Summary of John's Theory of Property*

John's theory of ownership can be summarized more easily than most. As John Kilcullen has suggested, the pope's basic criticism of the general Franciscan conception of poverty centered on two points: first, that no one can justly use a thing without at least a right of using; and, second, that no one can justly use a consumable "without having a particular right in it, namely property."[161] Let us put these two points into a broader context. If we discount God's obvious lordship over all things, then *dominium*—in the sense of proprietary lordship—first arose before the creation of Eve. This was exclusive (*proprium*) lordship, for there was no one else to share it with, and it derived its legitimacy from divine law. Once Eve was created, the lordship became common; presumably this happened 'naturally,' although the pope never explained how this occurred. Once the two shared paradise, they shared this lordship. Individual *dominia* began after the Fall. *Per iniquitatem*, people began to say that this or that was theirs. As kings and kingdoms came into existence, lordship began to be sanctioned by positive law as well.[162] This became the primary justificatory source of property rights, though not where it came into conflict with divine law. In addition to becoming a source of lordship, positive law introduced the right of action (*ius agendi*).[163] On this point there is some affinity between John's position and that of Accursius and Innocent IV. The latter, looking to Roman law, argued that *actiones* emerged from *ius ciuile*. Accursius said nearly the same thing, baldly stating that "all actions derive from *ius ciuile*."[164]

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[161] Kilcullen, "Political Writings," 308; cf. Parisoli, "Il concetto di diritto soggettivo," 108–09.

[162] *QVR*, 593.

[163] *QVR*, 593.

[164] *Comm.* ad X 1.2.7, s.v. "Constituerunt," as found in an unfoliated Venetian edition of 1495: "ubi uero rescriptum uel statutum lederet ius alterius in eo quod ad eum pertinet de iure ciuili, puta in actionibus que sunt prodite de iure ciuili, ut Dig. 1.2.2 [i.e., 1.2.2.6?]." This passage is discussed in Pennington, *Prince and the Law*, 149–51, and Tierney, *Idea of Natural Rights*, 143 and n. 40.For Accursius, see *Glos. ord.* ad Dig. 1.1.5, s.v. "Obligationes": "Actiones

John explicitly separated this right from the right of using, which he claimed no one could do without if they wanted to use justly. Presumably we could interpret this to mean that John was willing to admit that although the friars had a right of using the goods they licitly and justly used, this did not mean that they necessarily had any rights to sue in court if someone illegally deprived them of their right to use. John perhaps thought this right belonged instead to the Church.

As far as the use of things is concerned, John distinguished between consumables and non-consumables. For the latter, it is possible for people to use the items in question without holding ownership, but this was impossible when it came to consumables: to use a consumable, which meant the *consumptio rei*, was to be the owner. This was as true for the apostles as it was in the fourteenth century. As Bernhard Töpfer noted, in the pope's hands the apostles and early community of believers became a witness *against* the Franciscan point of view as they were both common and individual *proprietarii* of consumables.[165] However, even with non-consumables it was impossible to use them licitly and justly—which were synonymous for John—without a *ius utendi*.

Finally, John basically denied the Franciscan claim to a simple use of fact. The order itself certainly could not have this supposed use of fact, for it was only a fictive legal entity, and, as the word *facti* implies, this use requires a subject who can perform (*facere*) the act. Thus all an *ordo* can have is a *usus iuris*. Even more to the point, this simple use of fact is not something that can actually be had. *Usus facti* referred to the completed act, much like *facti* is a perfect passive participle of *facere*. This does not mean though, as his opponents would repeatedly claim, that John denied the possibility of someone actually using things. After all, John was willing to concede that the Franciscans could, like anyone else, illicitly use things by means of a "de facto" use. What he was trying to argue was that, for consumables, use of fact is not something one can obtain, since by the "completed act" their substance is consumed. At this point there is nothing left to obtain.

To respond to the pope the Michaelists had to deal with a number of different, but related, topics. First, they needed to prove that (simple) use of fact was actually obtainable. But this would be useless unless they could show that their order could have this use of fact, and did not need, or merely

omnes sunt a iure ciuili."

[165] Töpfer, "Anschauungen," 299: "Die Apostel und die Angehörigen der Urgemeinde waren also demnach in schärfstem Gegensatz zur franziskanischen Auffassung nicht nur gemeinsam, sondern auch einzeln volle Eigentümer von Verbrauchsgütern."

have, a use of right. Even more importantly, they had to show that a right of using was not necessary for a just and/or licit use of goods. This in turn meant demonstrating that the origin of lordship in the sense of proprietary ownership derived mostly from the positive law of a postlapsarian world. To achieve these goals would suffice for a coherent theory of property rights which afforded the Michaelists the position in society they wished to maintain. But to make this position meaningful, they also had to show that it was modelled after the position of the apostles within the early Christian community.

By way of conclusion, we should note that although John's theory of property was indebted to the Roman law tradition, it was so mainly in terms of his theory of use. Interestingly, he made even lighter use of canon law. Perhaps this was because he believed that a theory of use of lordship could not be as complicated as the Michaelists needed to make it. Thus, we are left with the paradoxical observation that it was the group most interested in proving how few legal rights they had that tended to make the most extensive use of legal sources.[166] In the following chapters, we shall look at some of these responses.

[166] Francis of Marchia is a notable exception to this trend.

CHAPTER THREE

# THE VARIETIES OF IUS

At the heart of the Michaelist-John poverty controversy was a heated debate over rights, or *iura*. In order to understand any Michaelist account of property or poverty, one should, as Marsilius of Padua once suggested, begin with with an analysis of the word *ius*.[1] Depending on the context, we translate this word into either "right" or "law," although it is not always clear which meaning was (primarily) intended.[2]

For the Michaelists, and in the context of the poverty controversy, I argue that *ius*, when it refers to law, belongs to one of three basic categories: divine law, natural law, and human positive (i.e., civil or canon) law.[3] These divisions are not as straightforward as one might suspect. The problem is that the exact relationship between these varieties of law is not always easy to pin down, and the Michaelists themselves could have quite different conceptions of these laws and their dispensability or mutability. One Michaelist text, for instance, argued that the only sphere of activity in which the pope could exercise *plenitudo potestatis* was that covered by "ecclesiastical positive law."[4] On the other hand, when *ius* meant what we typically call rights,

[1] *Defensor pacis* 2.12.3, in Scholz, *Marsilii defensor pacis*, 264: "Incipiemus autem distinguere significata iuris, quoniam ipsis indigebimus in aliorum distinccionibus et assignacionibus, non econverso."

[2] Cf. McGrade's 'unusual' translation of *ius naturale* as "natural law" in "Right(s) in Ockham," 80 and 74 n. 25.

[3] I omit mention of the *ius gentium* because the Michaelists tended to ignore it in their writings on evangelical poverty. In general, however, the *ius gentium* occupies an uneasy place between natural and positive law, and different authors tended to push it closer to one or the other category.

[4] *3 opp.*, 509: "Et certum est quod papa in his quae pertinent ad ius positivum ecclesiasticum habet plenitudinem potestatis super omnes. Unde ipse supra ius positivum dispensare potest, X 3.8.4, et de eo quod non est ius, potest ius facere, puta sententiam quae de iure positivo nulla est, potest facere validam, eam ratam et firmam habendo et confirmando de plenitudine potestatis, C. 3 q. 6 c. 10, et notatur C. 9 q. 2 c. 1, in glossa signata super verbo 'rata.' Et privilegia etiam in aliorum praeiudicum dare, C. 12 q. 2 c. 74.… Et sicut praedicta sunt certa et manifesta, ita certissimum est quod papa non potest contra ius divinum sive legem divinam, nec contra ordinata sive definita a sanctis patribus in fide sive moribus a iure di-

it meant a right which was grounded in, or derived from, one of these laws. The two most obvious rights we need to consider are those based in natural and positive law.[5]

This is of course different from how modern theories of rights work. Today it is often thought that rights must—somehow—derive from (a belief in) the autonomy of the individual.[6] This was point was made once again just recently. S. Adam Seagrave criticized Brian Tierney's interpretation of John Locke's theory of natural rights as part of a gradual development of previous medieval theories of natural rights which flourished in the sphere of a 'permissive' natural law. According to this analysis, the supposed rights Tierney discribed "are not *rights* in the full or strict sense of individual moral powers with their own justificatory bases."[7] Whether or not such a conception about the nature of rights is true, it amounts to an indictment of all medieval (so-called) rights thinking since no medieval thinker would imagine rights exist independently of some kind of justifying law.[8] Certainly the Michaelists would have found such an idea suspect to the point of being untenable. Their problem with the pope's account of property rights was not that the rights were not grounded in the different types of law, but, roughly, that he got some of the laws wrong, and that these laws do not cover all human actions.

Medieval thinkers also differ, I think, from modern theorists in that the taxonomy is either less sophisticated or less clearly articulated. Disentangling when and where an author means 'law' or 'right' by *ius* can be hard enough, though it often can be done. It is harder, and probably less useful, to determine whether an author's views about *ius* represent a theory of rights that is 'active' or 'passive,' or whether we should talk about 'objective right' or 'subjective rights.' However, although medieval authors did not write explicitly in this way, a brief recounting of what these terms mean today will sharpen our ability to understand what is at stake beneath the

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vino introductis aliquid statuere vel definire, nec in his dare aliquam legem novam…." Cf. *3 opp.*, 511–14. It is worth noting that a statement of this sort cannot be found in Michael's appeals, Francis's *Improbatio*, or Ockham's *OND*.

[5] Cf. Helmholz, "Natural Law and Human Rights," 12.

[6] Ibid., 22.

[7] Seagrave, "How Old Are Modern Rights?" 317 (emphasis Seagrave's). Seagrave discusses in this article Tierney, *Idea of Natural Rights*; Tierney, "Natural Law and Natural Rights"; Tierney, "Historical Roots"; and Tierney, "Dominion of Self." Tierney responded to the critique in "Response to S. Adam Seagrave"; and Seagrave reasserted his claim that "the [*sic*!] modern idea of natural rights" only began with Locke in "Identity and Diversity."

[8] Cf. Tierney, "Natural Law and Natural Rights," 405; Kilcullen, "Concepts of Rights," 51–55.

frequent, and frequently undistinguished, references to *ius* in this chapter and in those that follow.[9] And, after all, sometimes it is indisputable that an author has employed *ius* in a manner corresponding to one these modern ways of thinking.

The easiest classification is that between so-called active and passive rights, which can be thought of quite neatly as Hohfeldian privileges and powers in the first case, and claims and immunities in the second.[10] Active rights are understood when we can say that an agent has a right to do something; passive rights indicate that the agent has a right that another person or persons (not) do something. Powers represent the ability to change one's own or another's privileges, claims, or even other powers. Privileges are the ability to perform some activity, assuming there are no (external) limitations. Thus owners of cars may exercise their privilege of driving their own cars, but not each other's unless one owner has exercised her power to transfer the privilege of using to the other. Immunities prevent interference from other people—for example, hindering an agent from using her car. Claims, finally, can be against an individual or against people generally; often they can be verbally construed in the active voice as duties. Thus, a worker might have a claim to be paid by the employer (the employer has a duty to pay her workers), or an individual has a claim against unjustified despoliation of property (everyone must refrain from taking away an owner's property without cause).

The other major concern scholars have with rights in the medieval context is whether a thinker adhered to an 'objective' or 'subjective' understanding or *ius*. Historically, Ockham has often been described as a (revolutionary) champion of subjective rights, while others before him were advocates of the idea of objective right.[11] The amount of scholarship devoted to this debate is too vast to cite here, but a basic understanding of these two ideas will serve to show, I think, that the Michaelists (at least) switched between

[9] A useful overview of current rights thinking are Wenar, "Rights" [last accessed 2011 10 12] and Campbell, "Legal Rights" [last accessed 2011 10 12]. Kilcullen, "Concepts of Rights," is also useful in this context.

[10] For active and passive rights, see the discussion in Lyons, "Correlativity"; Tuck, *Natural Rights Theories*, 1–31, is useful on the classification, if less clear in the analysis. For the Hohfeldian categories, see Hohfeld, *Fundamental Legal Conceptions*, which is summarized concisely in Finnis, *Natural Law*, 199–205, and Wenar, "Rights," § 2.1. Reid, "Canonistic Contribution," 60–72, is good for relating Hohfeld to canonistic thought, and Tierney, "Hohfeld on Ockham" recently brought the these categories to bear on Ockham's *Opus nonaginta dierum*.

[11] Parisoli, "Ockham e la fonte dei diritti naturali," 6–8, discusses the broad categories in the historiography; see also Shogimen, "Defending Christian Fellowship," 608–09.

these two ideas so casually and unreflectively that they cannot be thought to have ascribed whole-heartedly to either view.[12] Both ideas were at play, and used as they were useful, though it is perhaps wrong to say that any of the Michaelists had a strong understanding of the differences between these two uses of *ius*.

Objective right seems simple enough a concept. Aquinas is often cited as a typical example because he tended to characterize *ius* as intimately connected with *iustum*: *ius* is used, he wrote, to refer to "just thing itself," (*ipsam rem iustam*) independently of a person's actions.[13] One's *ius* in this sense need not refer to what one would like or hope for, but it is what one is due. Thus, famously, Villey once noted that under Roman law the *ius* of the parricide was "to be sewn up in a sack of vipers and thrown into the Tiber."[14] Clearly, it is hard to characterize this as even a claim in the Hohfeldian sense.

Subjective rights are likely to be more intuitive to people today. Although there is probably no account that will satisfy everybody, subjective rights are usually conceived of as justified powers or claims to act in a certain way (if one so wishes). They are subjective precisely because they belong to or arise from—somehow—the individual him- or herself. In medieval texts, historians tend to find a subjective understanding of rights where *ius* is described, for example, as a *potestas* or *facultas*.

There is another, more prosaic reason to begin with *ius*. It is simply that a claim of *dominium rei* (lordship of a thing) generally entails a consideration of *ius*; put another way, it is common to assume that rights are found wherever lordship is found. *Ius*, of course, is not the only term that is important for understanding the debate, but it is the fundamental category in the sense that the Michaelists were mainly interested in denying that both individual Franciscans and the order as a whole had certain specific (proprietary) rights that are grounded in positive law.

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[12] Cf. Tierney, *Idea of Natural Rights*, 108–18, on Marsilius of Padua, although he is said there to carefully distinguish which meaning he meant. Yet, for all his careful analysis of *ius*, Marsilius's basic divisions of *ius* was not that different from the Michaelist position: *Defensor pacis* 2.12.3, in Scholz, *Marsilii defensor pacis*, 264–65: "*Ius* igitur in una sui significacione dicitur de lege.… Que siquidem duplex est: una quidem humana, reliqua vero divina"; and 2.12.7 (268): "Est autem et alia quedam *iuris*, et proprie humani, divisio in ius naturale atque civile."

[13] Brett, *Liberty, Right and Nature*, 4; the quotation here is from *STh* 2a.2ae.57.1 ad 1 (9:4). In addition to Brett, for this brief discussion, I draw on the following: Finnis, *Natural Law*, 205–10; Garnsey, *Thinking about Property*, 179–221 (*passim*); Tierney, *Idea of Natural Rights*, esp. 13–42; and Van Duffel, "From Objective Right."

[14] Tierney, *Idea of Natural Rights*, 16, citing Villey, "'Suum jus cuique tribuens'" 364.

## 1. *Ius and the Jurists*

Jurists, too, thought a great deal about *ius*, and it is worth looking at some of the common opinions about the different varieties of *ius* in order to appreciate better how novel the Michaelist position was. In what follows I briefly outline civil and canon law thinking about natural law and the origins of property.[15] I begin with the *Digest* and *Institutes* and two well known glossators, and then follow it with a brief examination of the *Decretum* and some of the more famous and accessible decretists. This is in no way meant to be an exhaustive study of the topic, but, combined with the work already done on the philosophical tradition, it will provide some basic context against which we can compare Ockham and the other Michaelists.[16]

### 1.1. *Roman Law & Two Glossators*

In Roman law the *loci classici* for reflecting upon the multi-faceted meanings of *ius* were the opening title of both the *Digest* and the *Institutes*, known by the title "De iustitia et iure."[17] Here one reads that *ius* may be thought of as the "ars boni et aequi." Ulpian then went on to divide *ius* into a private and public branch;[18] the *ius privatum* itself was described as tripartite, and it was in this sub-category where most of the mendicant poverty controversy should be located.[19] There was *ius naturale*, which is what nature teaches all animals, humans included (Dig. 1.1.1.3; Inst. 1.2.1), and which is always fair and good (Dig. 1.1.11). In the *Institutes* it was further described as not only

[15] See now Pennington, "*Lex naturalis*," for a useful overview of the topic in medieval juridical thought; see also his *Prince and the Law*, 119–32. On juristic attitudes towards property, see Couvreur, *Les pauvres*, 119–54, McGovern, "Private Property," and of course Weigand, *Die Naturrechtslehre*. Another strand of this history is covered by Swanson, "Rights of Subsistence."

[16] In addition to Weigand's the fundamental contribution to the topic, Brian Tierney has also devoted several important studies to this topic, which were eventually incorporated into his *Idea of Natural Rights*. The recent monographs of Garnsey, *Thinking about Property*, and Oakley, *Natural Law*, provide, in part, surveys of the subject. Accessible introductions to some of these themes can be found in McGrade, "Rights, Natural Rights," and Luscombe, "Natural Morality," now supplemented by Evans, "Law and Nature," and Nederman, "Individual Autonomy."

[17] The following is based on Dig. 1.1 and Inst. 1.1. For a useful introduction, see MacCormack, "Sources," 1–6; Stein, "Roman Law," provided the historical context, while Donahue, "*Ius* in the Subjective Sense," is an excellent account of the subjective use of *ius* in the *Digest*.

[18] Stein, "*Ius publicum* and *Ius privatum*" 2:499–500.

[19] Michael of Cesena's *Appellatio maior* is the exception: he instead built on a section of Bonaventure's *Apologia pauperum*; see Appendix A for discussion of this point.

observed by all people, but even, as it was established by divine providence, something that will endure strong and immutable (Inst. 1.2.11).

By natural law all men were born free from the beginning (Inst. 1.2.2), which is partly why some later commentators would refer to a *ius naturale primaeuum*, that is, the law that originally held sway over all creatures.[20] The *ius gentium*, on the other hand, was common (only) to all human beings. The *ius gentium* is apparently responsible for the advent of things like wars, nations of people, kingdoms, *dominia distincta*, property boundaries, buildings, commerce, buying and selling, leases and rents, and obligations—though civil law might also share the responsibility for certain specific instances (Dig. 1.1.5). However, the phrase, "ex hoc iure gentium," is ambiguous. Were, say, "distinct lordships" introduced "from the law of nations" in the sense of merely being permitted or are they things written into the substance of the *ius gentium* itself? Finally, the *ius gentium* is also sometimes described as what *naturalis ratio* has established among men, since just about (*quasi*) all humankind uses that *ius* (Dig. 1.1.9; Inst. 1.2.1).

To pass on to our last category, *ius ciuile* is described as something not wholly separate from either of the first two categories (Dig. 1.1.7) or at least from the *ius gentium* (Inst. 1.2.1). More importantly, it can trump the other types of *iura*. The jurist Paul described it rather idealistically as what is useful to all or many of the people in a city (Dig. 1.1.11).

At the same time, Roman law is replete with instances of a *ius* where in English we want to translate the word as "right." A famous line from the *Digest* bears this out: "Iustitia est constans et perpetua voluntas ius suum cuique tribuendi" (Dig. 1.1.10 pr.). Clearly, to say "allotting everyone his *law*" would be the more confusing choice.[21] Even so, as Michel Villey noted some time ago, the Roman law *ius* often seems to be meant in an objective rather than subjective sense, and that certainly seems to be the case here. We have already heard of the parricide; in another article, Villey argued that the jurist Gaius (fl. 130–180) spoke of *ius* in such a way that "right" seemed to be the wrong word entirely.[22] The passage adverted to describes a "ius …

[20] Weigand, *Die Naturrechtslehre*, 270 and 272, listed a few other references; see also Tarello, "Profili giuridici," 433 n. 340. The phrase may also be found in Hostiensis, *Summa aurea* ad X 2.12, n. 2, *Quid sit possessio* (525), which was a text Michael quoted from.

[21] Not, that is, that a modern translator is constrained to choose between only those two choices; here, one might plausibly choose "due" for *ius*. For comment, see Donahue, "*Ius* in the Subjective Sense" 1:507–08.

[22] See, e.g., Villey, "Les institutes de Gaius," 182.

altius tollendi aedes aut non tollendi,"[23] and it is hard indeed to conceive of a "right of not building higher."

There is a relatively straightforward answer, of course: the examples just given belong generally to a discussion of servitudes.[24] Personal servitudes include use and usufruct, as John XXII had noted.[25] Servitudes fall under the category of *iura in re aliena*, rights over another's property. But the right is vested in a beneficiary not as a subjective, personal right but as a right attached to (*in*) the thing itself, regardless of who happens to own it. Praedial and urban servitudes, to which Villey's example belongs, could not force the owner into doing something, only that he allow or not do something.[26] The owner was also not to act in such a way that he interfered with the beneficiary's right or access to the thing. The servient property was quite naturally servient to the dominant property, and the relationship could work in various ways.[27] For example, Roman citizens were normally guaranteed that a certain basic amount of sunlight would shine upon their buildings. If someone wanted more than that amount, he would need to acquire—usually by purchase—a servitude that prevented his neighbour from building above a certain point. It was, in Hohfeldian terms, an immunity. This was known as a *ius altius non tollendi*. Conversely, some neighbour might want to raise his building (and thereby obstruct some of his neighbour's access to light); in this case he would need to acquire a *ius altius tollendi*, that is, a privilege to build higher.[28] Even so-called personal servitudes only indicated that

[23] Gaius, *Institutiones* 2.31, in Gordon and Robinson, *Institutes of Gaius*, 60. Cf. Inst. 2.3.1 and 2.3.3, where it is expressed as the purpose of a liability "damnare ne altius tollat," or Dig. 8.5.4.7–8, where we read of a *ius altius tollendi* and the opposite case where we read "Si cui omnino altius tollere non liceat…"

[24] My understanding of servitudes is due especially to the discussions of Berger, "Encyclopedic Dictionary," s.v. "servitus" (702–03), and Miller, "Property," 65–75.

[25] Dig. 8.1.1. See also above, p. 50, where John excluded *ius utendi* from this category.

[26] Dig. 8.1.15.1: "Servitutium non ea natura est, ut aliquid faciat quis, veluti viridia tollat aut amoeniorem prospectum praestet, aut in hoc ut in suo pingat, sed ut aliquid patiatur aut non faciat." See Birks, "Concept of *Dominium*," 19–20.

[27] Cf. Dig. 8.2.2 and Gaius, *Institutiones* 2.30–32 (60). The important point to understand about praedial servitudes, which give "a real right over a particular parcel of land applying in favour of another parcel," is that they have "primarily to do with access" (if *servitutes praediorum rusticorum*) or "to do with the necessary mutual relationship between adjacent properties developed by building" (*servitutes praediorum urbanorum*). See Miller, "Property," 68–69.

[28] I have followed Birks, "Concept of *Dominium*," 17, here; cf. Garnsey, *Thinking about Property*, 187, who faulted Tierney, *Idea of Natural Rights*, 17, for his Villey-influenced reading. The *ius altius non tollendi* has led to many different opinions regarding what kind of 'right' this is. Perhaps what this shows best is that translating *ius* as always either 'law' or 'right'

the beneficiary was a specific individual. In the case of usufruct, then, the beneficiary had the rights to the use and the fruits of the thing, but not a right to its destruction: whereas the owner had full ownership before (rights to use, fruits, and destruction), by granting a usufruct, all that was left to him was the bare title of ownership (for the term of the usufruct).[29] He cannot even exercise the right of destruction at that point for he would be interfering with the usufructuary's temporary rights to use and enjoy the thing, although he might still alienate the property.

*Azo*

One of the most important glossators and teachers of Roman law was Azo (fl. 1198–1230).[30] Drawing on the work of others he took *ius naturale* to have five major meanings in his *Summa* on the *Institutes*, one according to the "impulse of sense-experience" (*motus sensualitatis*; i.e., Dig. 1.1.1.3), the others according to the impulse of reason.[31] It is thus not surprising that Azo tended to conflate *ius naturale* and the *ius gentium* in these latter senses.[32]

Azo stressed the immutability of *iura naturalia*, but he added that they could be blocked (*obfuscata*) by *ius ciuile* or the *ius gentium* in certain details,[33] which could even add to it.[34] Azo also argued that there was a *com-*

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is doomed to fail. Secondly, we should remember that it was in fact the land, and not the people who were burdened with the servitude.

[29] Gaius, *Institutiones* 2.30 (60), used the phrase *nuda proprietas*.

[30] For Azo's life and works, see Lange, *Römisches Recht*, 255–71. I have consulted both Azo, *Summa Azonis* and the texts printed in Weigand, *Die Naturrechtslehre*; the parenthetical reference indicates when the text comes from Weigand.

[31] Weigand, *Die Naturrechtslehre*, 56, quoting Azo's gloss to Dig. 1.1.1.3 (s.v. "animalium"), saw this division into two classes as the key classification.

[32] Cf. Azo, *Summa codicis* 7.32.3 (Weigand, 98): "Hec talis possessio, quam quis corpore suo vel oculis et animi affectu adipiscitur, naturalis est ut Dig. 41.2.1 pr., id est de iure naturali quod gentium appellatur. Non dico de iure naturali omnium animalium, ut Inst. 2.1.40. Nam irrationalia animalia affectum possidendi habere non possunt."According to Weigand, *Die Naturrechtslehre*, 62, "Das Naturrecht im Sinne des 'Völkerrechts' kennen [Azo and Accursius] natürlich; doch spielt es (als Naturrecht!) eine verhältnismäßig bescheidene Rolle." Cf. *Glos. ord.* ad Inst. 2.1.12, s.v. "gentium": "idest naturali," in Caprioli et al., *Glosse preaccursiane*, 35.

[33] *Glos. ord.* ad Dig. 1.8.3, s.v. "lapilli" (Weigand, 76); cf. Azo, *Summa institutionum* 1.2.8 (Weigand, 112): "Iura enim naturalia dicuntur immutabilia, quia nec possunt ex toto abrogari uel auferri; sed tamen potest eis derogari uel detrahi in specie, ut Dig. 1.1.6 pr." This was the medieval view; but it has been suggested that for the Romans, Roman *ius ciuile* was to be preferred to natural law in cases of conflict; see Garnsey, *Thinking about Property*, 120.

[34] Azo, *Summa institutionum* 1.2 n. 3 (1050): "Quarto modo dicitur ius ciuile, id quod non est praetorium, et detrahit, uel addit iuri naturali, uel gentium: ut liquet in potestate seruorum restricta, et tutela inuenta."

*munis omnium possessio* by natural law, which was to be shared, Weigand explained, in a time of necessity.[35] The picture is not entirely unambiguous, however, for Azo also argued that natural law in the sense of divine law allowed for private property, as the Decalogue makes clear:

> Immo etiam secundum ius naturale sunt distincta [dominia], quod aliquid est proprium, id est secundum ius diuinum. Dicitur enim furtum non facies. Item non concupisces rem proximi tui. Item non retinebis mercenarii tui mercedem. Item non appareas in conspectu dei tui (uacuus). Respondeo et tunc ius erat gentium et secundum illud dicebatur aliquid meum.[36]

In addition to the usual division between common and private, Azo also pointed out that Roman law designated some things as *publica*, and what are common, he explained, are not public, just as what are public are not common. It was not a straightforward distinction. Things might be called public because they belong to all peoples in that they pertain to the use of humankind alone, or because they belong to a specific population.[37]

Weigand also adduced a related passage from Azo's *Summa institutionum*, and explained that Azo thought the institution of private property relied primarily on the *ius gentium*, which was recognized and guaranteed by positive divine law.[38] This idea can also be seen in his commentary on the *Institutes*, where he claims that *dominia rerum* are acquired by the *ius gentium* or civil law, not natural law. Acquisition of lordship by the *ius gentium* is based on the idea of the *res nullius*; under civil law, acquisition occurs through usucapion, prescription, adoption, deportation, succession, and a number of related ways.[39]

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[35] *Glos. ord.* ad Dig. 1.1.5, s.v. "discrete gentes" (Weigand, 90–91). Cf. Azo, *Summa institutionum* 2.1 n. 4 (1061).

[36] Weigand, *Die Naturrechtslehre*, 96, referring to Dig. 1.1.5, s.v. "discrete gentes": "In fact, there are distinct [lordships] (which is something exclusive) even according to natural law, that is, according to divine law. For, it is said, you shall not commit theft; also, you shall not desire something belonging to your neighbour; also, you shall not keep back the wages of your labourer; also, you shall not appear idle in the sight of your lord. I respond: even then there was a law of nations, and a thing is said to be mine according to it."

[37] Azo, *Summa institutionum* 2.1 nn. 7–8 (1062).

[38] Weigand, *Die Naturrechtslehre*, 97: "Da aber unabhängig von der Gesetzgebung auf dem Berge Sinai, als noch die Völker vereint waren, bereits das 'Völkerrecht' bestand, beruht nach beider Ansicht die Einführung des Privateigentums zunächst auf dem 'Völkerrecht,' das in diesen Punkten eine Bestätigung und Sicherung durch das positive göttliche Gesetz erfuhr." The passage of Azo's reads: "Non dico quod dominia sint inventa de iure gentium de novo: quia et veteri Testamento aliquid erat meum, aliquid tuum."

[39] Azo, *Summa institutionum* 2.1 nn. 20–21 (1063): "Acquiruntur autem dominia rerum non iure naturali, sed gentium uel ciuili. Ciuili multis modis: ut usucapione, praescriptione,

It is perhaps also worth noting that Azo clearly understood that *ius* might sometimes have a more "subjective" meaning. After explaining that *ius* might refer to various types of law: natural, civil, praetorian, or even that which results from a judgment (*pro eo tantum, quod competit ex sententia*), Azo wrote:

> Ponitur etiam quandoque ius pro actione; quandoque pro obligatione qualibet, quandoque pro haereditate, quandoque pro bonorum possessione.… Sed et ius etiam [*sic*] in uulgari ponitur pro quodam cibo delicato, quandoque pro potestate: ut cum dicitur, sui iuris est. Et quandoque ponitur pro iuris rigore: ut cum dicitur inter ius et aequitatem, etc., ut Cod. 1.14.1.[40]

Azo clearly understood *ius* as having a wide range of possible semantic meanings. On the objective side of things, *ius* is said to be unyielding in the sense of someone being between 'right' and equity; and one could argue that the duty and claim represented by *obligatio* and *hereditas* belong to an objective understanding of *ius* as well.[41] Yet Azo suggests meanings that are more subjective: such as when *ius* is taken for *actio* (which the Michaelists tended to refer to as *ius agendi*, much to John's chagrin). Better yet is saying that *ius* can be taken for a *potestas*, that is, power or authority. To be *sui*

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arrogatione, monachatione, deportatione, testamento, sucessione, bonorum possessione, haereditatis aditione: de quibus modis, licet non de omnibus tractabitur infra, *commodius est autem a uestutiore incipere*: id est a naturali, quod dicitur gentium, *quod cum ipso genere humano rerum natura prodidit. Ciuilia enim iura tunc coeperunt esse, cum et ciuitates condi magistratus creari, et leges scribi coeperunt* ut infra Inst. 2.1.11. Iure igitur gentium dominia acquiruntur nobis multis modis, ut ecce in primis per occupatione eorum, quae non sunt in bonis alicuius" (italicized words are from the *Institutes*).

[40] Azo, *Summa institutionum* 1.1 n. 5 (1048): "*Ius* is also sometimes posited for action, sometimes for a certain obligation, sometimes for [the right of] inheritance, sometimes for the possession of goods.… But *ius* is indeed popularly posited for a kind of delicate food, sometimes for a power: as when it is said, 'he is under his own power.' And sometimes it is posited for the inflexibility of *ius*: as when it is said 'between the *ius* and equity,' etc., as in Cod. 1.14.1." The "delicate food" is a reference to the homonym *ius, iuris*, which means broth or soup. Also, it seems odd to consider "quandoque pro potestate" as being modified by "in uulgari." On *rigor iuris*, see Dig. 49.1.19.

[41] An *obligatio* is described in the following way. Inst. 3.13 pr.: "est iuris vinculum, quo necessitate adstringimur alicuius solvendae rei secundum nostrae civitatis iura"; cf. Dig. 44.7.3 pr.: "Obligationum substantia non in eo consistit, ut aliquod corpus nostrum aut servitutem nostram faciat, sed ut alium nobis obstringat ad dandum aliquid vel faciendum vel praestandum." On *hereditas*, see the pithy Dig. 50.16.24: "Nihil est aliud 'hereditas' quam successio in universum ius quod defunctus habuit." But the term refers both to what is (to be) inherited and the (new) legal status of the heir who is to succeed "in universum ius"; see Berger, "Encyclopedic Dictionary," s.v. "hereditas" (485) for elaboration.

*iuris* was to be one's own master, subject to no one else's authority.[42] Thus, it would seem that the very idea of being *sui iuris* meant not merely that one was "under one's own law," but that one had the freedom to act without reference to dictates of another; this is why Azo said that *ius* can be taken *pro potestate*.

*Accursius*

Azo's pupil Accursius (*ca.* 1185–1263) was responsible for compiling the massive *Glossa ordinaria* to the entire *corpus iuris civilis*.[43] It has been estimated that the Gloss contains almost 97 000 individual glosses and perhaps about 2 000 000 words.[44] As many of these glosses were Azo's, it is no surprise that Accursius held similar views regarding natural law. Similar to his teacher, Accursius thought *ius naturale* could be spoken of in at least four ways. He listed them in two different places, though with some variation. In a gloss to the *Institutes* he mentioned four major ways, but felt obliged to provide an additional description from canon law.

> Et nota quod quattuor modis ius naturale ponitur: Quandoque pro iure gentium ut infra Inst. 2.1.11; quandoque pro iure pactorum ut Dig. 2.14.1 pr.; quandoque pro eius contrario, scilicet pro eo quod rescindit pacta, ut in restitutione minorum, ut Dig. 4.4.1 pr.; quandoque pro instictu nature ut hic. Secundum canones ius naturale quod dicitur in lege mosaica uel Euangelio continetur, ut in principio decretorum.[45]

On Dig. 1.1.1.3, however, he explained the four ways thus:

> Primo lex Mosaica, ut Inst. 4.1.1. Secundo instinctus nature ut hic. Tertio ius gentium ut Inst. 2.1.11. Quarto ius pretorium, ut infra Dig. 4.4.1 pr., et facit, Inst. 1.2 pr.[46]

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[42] Cf. Azo, *Summa institutionum* 1.8 n. 2 (1055): "Est autem haec diuisio talis: quia omnis homo aut est sui iuris, aut alieni iuris, aut dubii secundum quosdam, qui dicunt statum alicuius quandoque esse in suspenso.… Nos contradicimus: esset enim absurdum eodem tempore, nec in patris, nec in sua quenquam fuisse potestate: ut Cod. 9.51.13.1."

[43] For Accursius' life and works, including a detailed examination of the fortunes of the *Glossa ordinaria*, see Lange, *Römisches Recht*, 335–85. As with Azo, I mark in parentheses where the reference has come from Weigand.

[44] Lange, *Römisches Recht*, 345; cf. Brundage, *Medieval Origins*, 119.

[45] *Glos. ord.* ad Inst. 1.2 pr., s.v. "natura" (Weigand, 57): "And note that natural *ius* is posited in four ways: Sometimes for the *ius gentium*, as below in Inst. 2.1.11; sometimes for its contrary, namely, for that which annuls pacts, as in the restitution of minors, as in Dig. 4.4.1 pr.; sometimes for the instinct of nature, as here. According to the canons, natural law is called what is contained in the Mosaic law or the Gospel, as in the beginning of the *Decretum*."

[46] *Glos. ord.* ad Dig. 1.1.1.3, s.v. "natura" (Weigand, 57): "First, the Mosaic law, as in Inst. 4.1.1; second, the instinct of nature, as here; third, the *ius gentium*, as in Inst. 2.1.11; fourth, the

Weigand suggested that Accursius perhaps realized over time the significance of D. 1 c. 1 for natural law theories, noting specifically that Accursius explicitly linked one sense of natural law to *lex diuina* in his glosses to the *Digestum nouum*. The canon law notion that natural law and divine law were in some sense the same was one that Accursius came to respect, but he was hesitant to adopt.[47] What I want to note is that he recognized the interchangeability of natural and divine law, and that he thought it could also refer to the *ius gentium*, which only applies to humans, and the instilled instinct of nature, which is true for all animals. Thus, for instance, the *coniunctio* of Adam and Eve is a product of natural law, following from the instinct of nature,[48] even though, as he noted elsewhere, the *ius gentium* arose as soon as God had created *gentes*.[49]

Accursius also recognized the immutability of *iura naturalia*, but he noted that the idea might be problematic for some. Slavery, for instance, existed licitly, yet Inst. 1.2.2 insisted that all men were born free "iure naturali." Azo had suggested that although natural law could not be completely overriden, it could be modified in part. Slavery and usucapion, Accursius explained, were examples of where natural law was not observed, which need not be considered a derogation of natural law.[50] Elsewhere, however, he described it as such. Slaves, for example, are always free from the perspective of natural law (*inspecto iure naturali*)[51] even if they are non-persons according to *ius ciuile*.[52] This is of course a case where civil law has restricted (*derogauerit*) natural law in part.[53]

Private property is another area where immutable natural law is a little elastic. In the original state of affairs, that is, "sub suo iure naturali primae-

*ius pretorium*, as below in Dig. 4.4.1 pr., and [my comment in] Inst. 1.2 pr. makes [the same point]." (See the above note for his cross-reference.)

[47] Weigand, *Die Naturrechtslehre*, 58–59.

[48] *Glos. ord.* ad Inst. 1.2 pr., s.v. "hinc" and ad Dig. 1.1.1.3, s.v. "coniugatio" (Weigand, 60, 81–82).

[49] *Glos. ord.* ad Inst. 2.1.11, s.v. "prodidit" (Weigand, 107).

[50] *Glos. ord.* ad Inst. 1.2.11, s.v. "Set naturalia" (Weigand, 112–13): "Set quod dicit esse immutabile est contra quod de seruitute dicitur que est contra ius naturale et tamen preualet ut supra Inst. 1.2.2(!). Set dic, non derogatur ob hoc, licet non seruetur (in illo casu). Nam nichilominus bonum et equum est. Et eodem modo respondeo ad id quod dicitur infra Inst. 1.16.6, quod est contra. Item (eodem modo ut prius respondeo) ad id quod de usucapione dicitur infra Inst. 2.6 pr., quam constat esse contra ius naturale ut Dig. 12.6.14(!)." Cf. Weigand, *Die Naturrechtslehre*, 115.

[51] *Glos. ord.* ad Dig. 1.1.4, s.v. "datio" (Weigand, 77).

[52] *Glos. ord.* ad Dig. 1.1.5, s.v. "obligationes" (Weigand, 104–05). Cf. Dig. 50.17.32.

[53] *Glos. ord.* ad Dig. 1.1.4, s.v. "nascerentur" (Weigand, 117).

vo," all things were common;[54] but Accursius followed Azo quite closely in arguing that *dominia distincta* existed on the basis of divine (natural) law and the *ius gentium*. Regarding the idea that "all things are common by natural law,"[55] he suggested that one might say that it was on the basis of the *ius gentium* that someone said something was his own, or that it simply meant that things were to be shared. There was no mention that this sharing of all things was true only for times of necessity,[56] perhaps lending weight to Couvreur's claim that Accursius seems to have promoted fraternal charity over Ulpian's Roman individualism.[57]

### 1.2. *Gratian & the Decretists*

The canon law tradition also provided a fair amount of material for discussions of *ius*.[58] If anything, the opening distinctions of Gratian's *Concordance of Discordant Canons* were more liable to confuse than illuminate untrained readers.[59] But Gratian's purpose was not to define *ius* so much as gather together what others had said about it. Neither Gratian nor those who came after him imagined that there was a single comprehensive account or defini-

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[54] *Glos. ord.* ad Inst. 2.1.5, s.v. "publicus": "Cuius respectu vera sit opinio [Johannes Bassianus]. Nam communia sunt relicta sub suo iure naturali primaevo, quo omnia erant communia." And *Glos. ord.* ad Inst. 2.1.1, s.v. "naturali iure": "id est iure gentium (quod est naturali ratione inductum ut Dig. 1.1.9) de quo hic loquitur ut infra Inst. 2.1.11 et in fine huius §. Nam iure naturali primeuo etiam alia essent communia." These quotations come from Weigand, *Die Naturrechtslehre*, 88–89, where the words in parentheses are said to be an addition of the second recension.

[55] Cf. Inst. 2.1 pr. The phrase is also used by Gratian, Huguccio and the *Glossa ordinaria* to the *Decretum* (among others); see below pp. 79 and 95, and nn. 144, 156, and 166.

[56] *Glos. ord.* ad Dig. 1.1.5, s.v. "discrete gentes" (Weigand, 96–97): "Immo etiam secundum ius naturale sunt distincta, quia secundum ius diuinum aliquid est proprium; dicitur enim 'furtum non facies' … (wie Azo). Et si dicatur 'omnia sunt communia iure naturali' expone id est communicanda; (uel dic) etiam tunc quando precepta dabantur erat ius gentium et secundum illud dicebatur aliquid meum; nam cum essent gentes iam coniuncte erat ius gentium ut Inst. 2.1.11." Weigand, *Die Naturrechtslehre*, 91–92, explained the *communicanda* as an appropriation by both Azo and Accursius of the canonistic belief that things must be shared in times of necessity. It is interesting, however, that neither one makes reference to necessity as a prerequisite.

[57] Couvreur, "Pauvreté et droits des pauvres," 34, citing *Glos. ord.* ad Dig. 1.1.10.1, s.v. "Cuique."

[58] Ullmann, *Medieval Papalism*, 38–75, provides a dated, but readable and wide-ranging survey of canonistic ideas of natural law.

[59] On Gratian and the *Decretum*, see now Landau, "Gratian."

tion of *ius*.[60] Here I shall only focus on some of the more important *capitula*, particulary those deemed important by the Michaelists.[61]

*Gratian*

Gratian (fl. 1125–40) introduced the subject by noting that the human race is governed by two things: *ius naturale* and *mores* (D. 1 d.a.c. 1).[62] Regarding the customs, which he described as *longae consuetudines* (D. 1 c. 4), once they have been written down they acquire the name of *lex humana* (D. 1 d.p.c. 1; cf. D. 12 c. 6).[63] *Lex* itself may thus be human or divine; divine *lex* agrees with "nature," and "*fas* is divine law" (*fas lex diuina est*), while "*ius* is human law" (*ius lex humana*). It is *fas* to pass through another's field, but not [necessarily] *ius* (D. 1 c. 1). One cannot but conclude with Gratian that *ius* is a general term, which has many species below it (D. 1 d.p.c. 1). It may well be so called because it is just; but all *ius* agrees with *leges* and *mores* (D. 1 c. 2).[64]

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[60] Panormitanus's comments summarize this idea well: "Nota novem exempla iuris naturalis que ponuntur hic in textu. Non enim intelligas quod naturale restingatur ad ista exempla, vel quod per ista lex naturalis diffiniatur. Nam multa alia exempla poni possunt." Quoted in Pennington, "*Lex naturalis*," 567 n. 59.

[61] A useful account of Gratian's sources of law is found in Gaudemet, "La doctrine des sources," who separated Gratian's sources from his own contributions more explicitly than I have attempted here; Gaudemet attempted to give Gratian's "personal" opinion near the end of his essay (24–27). See also Kuttner, "Sur les origines," and Weigand, *Die Naturrechtslehre*, 132–40; Eynde, "'Ius positivum' and 'Signum positivum,'" and Tarello, "Profili giuridici," 364–68, consider the contemporary theological background. See now also Mäkinen, "Rights and Duties," 41–43, who also considered Aquinas and Bonaventure on the following pages.

[62] Biographical details can be gleaned from Noonan, "Gratian Slept Here", and Winroth, *Making of Gratian's* Decretum, 5–8; see also Pennington, "Medieval and Early Modern Jurists," s.v. "Gratian" [last accessed 2011 10 31], which includes an ever growing literature list for all the canonists discussed in this chapter.

[63] At C. 16 q. 3 d.p.c. 16, however, Gratian wrote that rescripts might be sought "contra ius scriptum."

[64] There is clearly some slippage between divine and natural law which is never fully resolved. At D. 9 d.p.c. 11, however, he tried to provide a neat solution: "Cum ergo naturali iure nichil aliud precipiatur, quam quod Deus uult fieri, nichilque uetetur, quam quod Deus prohibet fieri; denique cum in canonica scriptura nichil aliud, quam in diuinis legibus inueniatur, diuine uero leges natura consistant: patet, quod quecumque diuinae uoluntati, seu canonicae scripturae contraria probantur, eadem et naturali iuri inueniuntur aduersa. Unde quecumque diuinae uoluntati, seu canonice scripture, seu diuinis legibus postponenda censentur, eisdem naturale ius preferri oportet. Constitutiones ergo uel ecclesiasticae uel seculares, si naturali iuri contrariae probantur, penitus sunt excludendae." Thus, there is supposed to be a fairly tight correspondence between *ius naturale* and *leges divinae*, for the latter agree with nature (*natura consistant*) and trump discordant man-made decrees. Cf. Weigand, *Die Natur-*

Yet there is, explained Gratian (D. 1 d.p.c. 5), another division of *ius*. It is reminiscent of Ulpian's tripartite division we saw from Roman law—natural, civil, or of the nations.[65] Natural *ius* is common to all nations because it is had by instinct of nature rather than an enactment. To qualify for this list it must never be unjust but rather natural and fair (D. 1 c. 7).[66] Natural law in fact receives extensive treatment in the early distinctions. It began at the appearance of rational creatures, and, more importantly, it is immutable (D. 5 d.a.c. 1)—though this statement is rather casuistically qualified a little later on (D. 6 d.p.c. 3). Finally, natural law is said to prevail over other law (D. 8 d.p.c. 1; D. 9 cc. 1–2).

Civil law, by contrast, is proper to an individual people or *civitas* (D. 1 c. 8). The *ius gentium* is so called because "nearly all people use it" (D. 1 c. 9). Gratian also described a *ius consuetudinis*, which we should connect with the *lex humana* of above, and therefore with *ius ciuile* (or the *ius gentium*). It emerged only once people began to live together, that is, when Cain built a city (D. 6 d.p.c. 3).

Private property did not exist under natural law. There was a "communis omnium possessio" (D. 1 c. 7). Gratian's introductory remarks to the eighth distinction are worth quoting:

> Differt etiam ius naturae a consuetudine et constitutione. Nam iure naturae sunt omnia communia omnibus, quod non solum inter eos seruatum creditur, de quibus legitur: "Multitudinis autem credentium erat cor unum et anima una," etc. [cf. Act. 4:32] uerum etiam ex precedenti tempore a philosophis traditum inuenitur. Unde apud Platonem illa ciuitas iustissime ordinata traditur, in qua quisque proprios nescit affectus. Iure uero consuetudinis uel constitutionis hoc meum est, illud uero alterius.[67]

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*rechtslehre*, 132, who wrote that Gratian stressed that "das Naturrecht (in seinem Verständnis) mit dem göttlichen Recht identisch ist"; he went on to suggest that *fas* and *lex naturalis* were, for Gratian, synonymous expressions for *Naturrecht*. The fundamental divide, Weigand argued (133), was between *menschliches Recht* (*mores*) and *natürliches oder göttliches Recht*.

[65] D. 1 c. 11 also mentions *ius publicum* like Roman law, but without suggesting that it is a primary category of *ius*. In fact, it seems a characteristic of (early, post-Gratian) canon law to treat the private/public divide as a relatively trivial distinction. See *Summa Paucapaleae* ad D. 1 c. 11, in Schulte, *Summa Paucapaleae*, 7. Gaudemet, "La doctrine des sources," 16, suggested both Isidore and Ulpian's non-extant *Institutes*.

[66] Gaudemet, "La doctrine des sources," 16–18, for a detailed comparison of D. 1 c. 7 to the classical Roman law tradition.

[67] D. 8 d.a.c. 1: "The law of nature also differs from custom and enactment. For all things are common by the law of nature, which is not only believed to have been observed among them (about whom it is read: 'there was one heart and one soul for the multitude of believers'), etc., but even is found to have been handed down in an earlier time by the philosophers.

Gratian got Plato wrong of course, but he was in good company.[68] More to the point, though, by natural law all things were common to all people; only by the right of a custom or an enactment (*ius consuetudinis uel constitutionis*) do we say one thing is ours or another's. The *Magister* then inserted a text of Augustine's which supported this very point.[69]

A distinction made famous by Samuel von Pufendorf will help Gratian's comments in perspective.[70] His suggestion was to contrast positive and negative communities. The idea is quite simple. A negative community is one where no one actually owns anything; everything is, to use a Roman law concept, *res nullius*.[71] In this scenario original acquisition does not in fact injure anyone else's rights, though it could be argued that they are at least potentially diminished. A positive community, on the other hand, is one where "things are possessed collectively so that people [have] access to resources in common and no one [can] be excluded from using anything."[72] The canonists did not make use of this terminology, unfortunately, but it seems reasonable to say that the community described by Gratian belongs to the latter category. By an instinct of nature—hence our phrase natural law—there was a common possession of all things. By natural law everything is common to everybody.

Gratian's first distinction discussed *ius* in a far greater variety of contexts than the one just given, but not all are relevant to our discussion. What remains is to consider *ius* as it relates to what we call an individual (subjective) "right," and in forms that can easily be mapped onto Hohfeld's jural categories. The following is a small sampling taken from Gratian's *dicta*.[73] Gratian wrote of a *ius consecrandi* (D. 68 d.p.c. 2), a *ius percipiendarum de-*

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Hence, according to Plato, that city in which no one knows his own attachments is given as the most justly ordered. But by the right of a custom or a enactment, this thing is mine, but that one another's." I have followed the translation for *affectus* suggested by Kuttner, "Gratian and Plato," 93.

[68] Garnsey, *Thinking about Property*, 6–58; on Gratian and the Decretists, see Kuttner, "Gratian and Plato," esp. the appendix (108–18), which discusses *Quo elongati* and *Dilectissimis*.

[69] Augustine, *In Iohannis Evangelium tractatus* 6.25–26, in Willems, *Augustini in Iohannis Evangelium*, 66–67. MacQueen, "Augustine's Concept of Property," remains the best study of Augustine's views, but the scattered remarks of Garnsey, *Thinking about Property* put him into context. Gaudemet, "La doctrine des sources," 26–27, dismissed this aspect of DD. 1–20 far too quickly.

[70] Samuel Pufendorf, *De iure naturae et gentium* 4.4.1–4 (362–66). I learned of this distinction via Tierney, *Idea of Natural Rights*, 135 n. 10, and Garnsey, *Thinking about Property*, 115–16.

[71] This term is explained in greater detail below, p. 257.

[72] Garnsey, *Thinking about Property*, 116.

[73] Cf. Tierney, *Idea of Natural Rights*, 57–58.

*cimarum* (C. 13 q. 1 d.p.c. 1), a *ius tumulandi* (C. 13 q. 2 d.p.c. 1), or a church's inability to be deprived of *suum ius* (C. 16 q. 1 d.p.c. 41). The Roman Church imparts *ius* and authority upon the holy canons, but it is not bound by them: rather, it has the right of establishing canons.[74] In a telling *dictum* Gratian explained that while the founders of churches have the *ius prouidendi, et consulendi, et sacerdotem inueniendi*, regarding the ecclesiastical resources they do not have a *ius uendendi, uel donandi, uel utendi tamquam propriis*.[75] Let this suffice to show that Gratian also used *ius* in a way congruent to our modern, general understanding of "right." By this I mean that when Gratian wrote *ius utendi*, he meant a "right of using" in a way analogous to the participants in the poverty controversy. That is, the "right" is a right because some law protects or instantiates it.

*Paucapalea*

The canonists, too, were no stranger to the variety of meanings *ius* might have. The decretists, who flourished in the second half of the twelfth century often dealt with this as they worked through the early distinctions of Gratian's *Decretum*. Paucapalea was the first. His collection of glosses probably dates to the years before 1148 in Bologna.[76] His "Introduction" will be familiar to readers of Gratian in its broad strokes, but his focus is apparently the *ius ecclesiasticum*, which is either natural, written, or customary.[77] Natural law is contained *in lege* and *in evangelio*. It began with the introduction of rational creatures, has primacy over other laws, and does not vary over

[74] C. 25 q. 1 d.p.c. 16: "Sacrosancta Romana ecclesia ius et auctoritatem sacris canonibus inpertit, sed non eis alligatur. Habet enim ius condendi canones, utpote que caput et cardo est omnium ecclesiarum, a cuius regula dissentire nemini licet. Ita ergo canonibus auctoritatem prestat, ut se ipsam non subiciat eis."

[75] C. 16 q. 6 d.p.c. 30: "Si ergo ecclesiasticas facultates potestatem dispensandi non habent multo minus ipsas ecclesias quibuslibet ad regendum conmittere uel aliis auferre ualent. §. 1. Hic autem distinguendum est, quid iuris fundatores ecclesiarum in eis habeant, uel quid non? Habent ius prouidendi, et consulendi, et sacerdotem inueniendi; sed non habent ius uendendi, uel donandi, uel utendi tamquam propriis."

[76] Schulte, *Summa Paucapaleae*, IX–X, dated the *Summa Paucapaleae* to the years 1144–50; cf. Pennington and Müller, "Decretists," 129. Recently, Weigand, "Frühe Kanonisten," 136 (and n. 5), has argued for the tighter date 1146–50; Winroth, *Making of Gratian's* Decretum, 141, cited Weigand with approval, but remained open to the possibility of a later date.

[77] *Summa Paucapaleae*, Introductio (1): "De origine vero iuris restat dicendum. Sed quia ecclesiasticorum iurium aliud naturale, aliud scriptum, aliud consuetudinarium dicitur, quo tempore horum quodque coeperit, merito quaeritur." Weigand, *Die Naturrechtslehre*, 141, has rightly stressed the importance of equity (*Gerechtigkeit*) for Paucapalea's conception of natural law; Pennington, "*Lex naturalis*," 574, following Kuttner, has argued a similar point about his concern for the common good.

time, always immutable. Following this is the *ius consuetudinis*, which arose as people began to come together to live, that is, probably when Cain first built a city. It also coincided with the beginning of Nimrod's (subsequent) oppression of people. Finally, the origin of *scripta constitutio* dates from the time of Moses.[78]

Paucapalea fused the concepts of natural and divine law. On Gratian's point that divine *leges* agree with nature, he wrote that these laws "had their origin from nature" (*natura principium habuerunt*), which he then re-explained to mean that they "have their origin from natural law" (*principium a naturali iure habent*).[79] For Paucapalea, the point was to differentiate human law from its superior counterpart.

In terms of property rights under natural law, Paucapalea naturally came down on the side of a *communis possessio*. That is, Paucapalea seems to have followed his *magister*'s opinion that in the original, natural state, there was property in common, as there would be in a positive community. But this was not something that he really argued for; rather, he only used the idea of common possession to explain the difference of *fas* and *ius*.[80]

### *The* Summa parisiensis

The *Summa parisiensis*, datable to about 1160 in the emerging Parisian school, provides evidence that Paucapalea's interpretation was a relatively common one.[81] The author divided *ius* first into natural law and customs, and went on to explain that natural law had its origin in the creation of man *ex prima natura*. It is what is given in the law and the Gospel, though not everything in the Gospel is natural law. But divine law and natural law are conflated: "jus naturale quod est lex divina."[82] The author seems a little confused by

[78] *Summa Paucapaleae*, Introductio (1–2).

[79] *Summa Paucapaleae* ad D. 1 d.a.c. 1 (4). Though, as noted by Weigand, *Die Naturrechtslehre*, 141, it does seem that the *göttliches Gesetz* somehow "flows from Nature" (*aus der Natur erfließen*).

[80] *Summa Paucapaleae* ad D. 1 c. 1 (4). It is worth noting that he did not feel compelled to mention this point again when commenting on D. 8 (14). Cf. Tarello, "Profili giuridici," 368 n. 81.

[81] McLaughlin, *Summa Parisiensis*, XXI–XXXIII, argued for *c.* 1160, but there are arguments in favour of dating it about a decade later; see Pennington, "Medieval and Early Modern Jurists," s.v. "*Summa parisiensis*." See Weigand, "Transmontane Decretists," 181–82, for general observations.

[82] *Summa parisiensis* ad rubr. D. 1 c. 1, s.v. "divinae legis" (1), and ad D. 5 d.a.c. 1, s.v. "nunc autem" (5): "Incipit distinguere divinum jus ab humano. Non tamen ponit hoc nomen divinum sed naturale quod idem est, etc." He went on to give an ample list of what the term

the second, *jus Romanum* division of *ius*; he described it as "incongrua." His exposition is correspondingly unclear. On the opening words of D. 1 c. 6, he wrote:

> *Jus autem.* Alia juris divisio quæ videtur incongrua [cf. D. 1 d.p.c. 5] quia jus Romanum colligit hæc omnia, quare non est hoc vel illud. Resp.: Alia est hoc, alia est illud, ut ad singula juris referas, i.e. omne capitulum juris est tale vel tale. Quod item videtur verum qua quiddam jus naturale fit civile quando communi consensu recipitur et rescribitur. Resp.: Omne jus originaliter est hoc vel illud, i.e. habuit primam originem vel ab hoc vel ab illud [*sic*].[83]

The use of *hoc* and *illud* is unhelpful here. Presumably, they refer to the different kinds of *ius*, but what is really the novel idea here is that natural law can become positive law through it being written down. In a previous comment, following Gratian, he had made a similar point about the difference between enactments and customs.[84]

The focus on the division between natural/divine law and positive civil law has important consequences for the status of property. Although natural law is unchanging, it can be overriden in specific cases. The author cites the two classic examples from Roman law: slavery and property. He makes an interesting claim, however: natural law that is written down does not change, but unwritten natural law might be modified (*derogatum*)—and the right of liberty and the common good have not been written into law.[85] There is therefore room to manoeuvre on these issues.

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might refer to: *Summa parisiensis* ad D. 8 d.p.c. 1, s.v. "Dignitate" (7) and c. 2, s.v. "Quae contra" (7–8).

[83] *Summa parisiensis* ad D. 1 c. 6, s.v. "Jus autem" (2):"*Jus autem.* There is another division of law that seems inconsistent: for Roman law amasses all these reasons why it is not one [*ius*] or the other. Response: One is this, another that, so that you refer to the individual points of the law; that is, every chapter of the law is such or such. But it also seems true where a certain natural law becomes civil when it is accepted by common consent and issued as a rescript. Response: every law is originally one or the other; that is, it had its first origin either from this or from the other."

[84] *Summa parisiensis* ad D. 1 d.p.c. 5, s.v. "Cum itaque" (2).

[85] *Summa parisiensis* ad D. 5 d.a.c. 1, s.v. "dignitate" (5): "Vel possumus dicere quod ea quæ sunt in evangelio, in veteri testamento, sunt de naturali lege quæ, etsi deleantur ad litteram, non tamen delentur ad mysticum. In illud opponitur de servitute et de communi possessione in quibus derogatum est juri naturali. Divino enim jure et humano servi habentur. Monachi etiam quaerunt proprietates sed ad usus pauperum. Ad quod dicimus: jus naturale quod redactum est in præceptum scriptum non mutatur. Jus autem libertatis et communis boni non est redactum in scriptum." See *Glos. ord.* ad D. 4 d.p.c. 3, s.v. "abrogate," which explains the difference between *abrogare* and *derogare* as between total abolishment and partial cancellation.

After passing over Plato's city in some confusion, the author of the *Summa parisiensis* considered the issue of ecclesiastical property.[86] All things may indeed be common *iure naturae*, he noted, but we must consider the context of the Augustine quotation. *Quo iure* was addressed to heretics, and Augustine simply meant that possessions were said to be possessed *iure imperatoris*, and those who do not wish to worship the author of peace in peace should not possess anything *iure ecclesiae*. Thus, the emperor can, *iure*, take away heretics' possessions. The author of the *Summa parisiensis* was not sure it was that straightforward, however. Are not, after all, things prescribed to and possessed by the Church "jure divino, i.e. canonico"? His solution depended on whether the law was being interpreted strictly or not. The Bible, for example, tells us to sell what we have (Mt. 19:21) or to not desire what belongs to our neighbour (Ex. 20:17); this is the law being taken strictly. Thus, under the natural law which existed in the beginning, or the *primaeva institutio rerum*, it was as if there were no *proprietas* and all things were under the care of God.[87] In fact, according to *ius divinum*, we are mere *usufructuarii* of the things of the world: God is the *proprietarius*.[88] Natural law, in other words, originally ensured a positive community of goods.

That, however, was in the context of natural law. The author of the *Summa parisiensis* did not have trouble allowing for private property. As we know, the content of natural law is not wholly immutable. Certain passages of the Old Testament might now only (need to) be understood *ad mysticum* rather than literally. On *Dilectissimis*, one of the Michaelists' most cherished *capitula* of the *Decretum*, our author wrote simply that "clerics in fact had things of their own in the primitive Church."[89] This was true of the apostles as well. The *Summa parisiensis* insisted that things were common among the

[86] *Summa parisiensis* ad D. 8 d.a.c. 1, s.v. "Differet" (7): "et in illa civitate quam fingit Plato multi propria habebant, sed se debebant æqualiter diligere." Cf. *Summa parisiensis* ad C. 12 q. 1 c. 2, s.v. "et coniuges" (156).

[87] *Summa parisiensis* ad D. 8 c. 1, s.v. "Quo jure" (7): "Resp.: Jus divinum multum stricte hic accipitur, scilicet illud jus naturale quod fuit in initio, scilicet primæva institutio rerum quasi non proprietate et Domino curatæ sunt." The text here is not as clear as one would like. Couvreur, *Les pauvres*, 138 n. 432, gave a slightly different reading (*quae* for *quasi* and *creatae* for *curatæ*). Tarello, "Profili giuridici," 369 n. 87, came down on McLaughlin's side; I do as well. McLaughlin was well aware of the text's difficult problems; for comment, see pages IX and XXXIII of his introduction.

[88] Tarello, "Profili giuridici," 368–69, said that the idea that ownership (*proprietà*) is a necessary institution was a dominant concept in the *Summa parisiensis* precisely because of this claim. Cf. Weigand, *Die Naturrechtslehre*, 335.

[89] *Summa parisiensis* ad C. 12 q. 1 c. 2, s.v. "Dilectissimis" (156): "Revera in primitiva ecclesia clerici propria habebant."

apostles, but not shared with everyone else (*quæ erant Apostolorum, inter se erant communia, sed non omnibus aliis*), rather like Plato's city, where many people had *propria* even though they were to love each other equally.[90]

*Rufinus*

Among the early decretists Rufinus (fl. 1150–1191) is perhaps the most interesting of all.[91] One of the more important Bolognese canonists, he is well known to those interested in such matters as the canonist who added a new level of complexity to *ius naturale* thinking. His name appears again and again in Rudolf Weigand's extensively documented monograph on juristic teaching on natural law as a profound influence on subsequent canonists. One reason for this fame comes from the claim that his *Summa decretorum* might be the first instance of where *ius* is being used in a truly subjective sense.[92] It is considered a subjective use of *ius* because he described *ius naturale* as a "vis quedam humane creature a natura insita ad faciendum bonum cavendumque contrarium."[93] It is true that this is an important formulation of possible meaning of *ius*, which clearly antedates Azo's, but it is no less important to note how deeply connected it is to more normative concepts. This power, this natural *ius*, is implanted by nature and is a power to do good and avoid evil. It is hardly a simple power to act.[94] There is no "right to do wrong" implied in this usage, as modern theorists sometimes imagine (subjective) rights must include.[95]

In order to understand Rufinus's statement here, we need to consider the larger context more carefully, especially since he also used *ius* in more

[90] *Summa parisiensis* ad D. 8 d.a.c. 1, s.v. "Differet" (7). Pace Tarello, "Profili giuridici," 369, I do not see how the position of the *Summa parisiensis* is similar to what was said by Stephen of Tournai in his *Summa*, as asserted, other than that both authors suggested divine law "admitted" ownership. See *Summa Stephani* ad D. 8 c. 1, s.v. "Nonne iure humano," in Schulte, *Summa Tornacensis*, 17. Stephen's *Summa* was written *ca.* 1165–67: Pennington and Müller, "Decretists," 136–37.

[91] See Weigand, "Frühe Kanonisten," 138–40, for his career; see also Pennington, "Medieval and Early Modern Jurists," s.v. "Rufinus," and Pennington and Müller, "Decretists," 135–36.

[92] Tierney, "*Ius* and Metonymy," 552; cf. Weigand, *Die Naturrechtslehre*, 154, 288. His *Summa* dates to about 1164: Pennington and Müller, "Decretists," 135.

[93] Rufinus, *Summa decretorum* ad D. 1 d.a.c. 1, in Singer, *Summa decretorum*, 6: "a certain power of a human creature, implanted by nature, to do good, and to avoid the opposite." Parenthetical references are to the pages of this edition, but see also the excerpts in Weigand, *Die Naturrechtslehre*, 144–48.

[94] Cf. Mäkinen, "Justice, Law, Power, and Agency," 13.

[95] See the classic discussion in Waldron, "A Right to do Wrong"; see Van Duffel, "Natural Rights" for other modern proponents of this view.

'objective' senses. Rufinus began his *Summa decretorum* with an account of what Gratian was trying to do at the start of his work. Before everything else, Rufinus explained, Gratian tried to sort out *ius naturale* and other meanings of *ius*.[96] Rufinus followed the *Magister* on this point. He first dismissed the Roman law claim that natural *ius* is what nature taught all animals as too general: he wanted one that applied only to humankind.[97] One question that needed answering was what natural law consisted of. This was his innovation. It consisted of three different things: commands, prohibitions, and "indications" or "recommendations" (*demonstrationes*).[98] The first two commanded what was beneficial and prohibited what was harmful. He gave the example of the command to love God and the prohibition against killing. Natural law, which existed according to morals (*iuxta moralia*), was immutable with respect to these sorts of things,[99] even indispensable.[100] The "recommendations" are the most interesting category. Natural law recommendations operate between the two absolute spheres of commands and prohibitions by recommending what is appropriate. Two of Rufinus's examples were that all things be held in common and that there be one liberty for all people.[101]

Natural law surpasses the other types, namely civil law or the *ius gentium*,[102] in origin, dignity, and breadth. It antedates other *iura* and surpasses them in dignity because its commands and prohibitions trump the *iura* of

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[96] Rufinus, *Summa decretorum*, praefatio (5): "Ante omnia multiplices species et divisiones iurium assignans, differentiam iuris naturalis ad alia iura demonstrat; ubi de inventione, ordine et appellatione iuris canonici satis evidenter explanat."

[97] Rufinus, *Summa decretorum* ad D. 1 d.a.c. 1, s.v. "Humanum genus" (6). Cf. Ullmann, *Medieval Papalism*, 40, regarding the canonists generally.

[98] Kilcullen, "Concepts of Rights," n. 65, pointed to Alexander of Hales's description of *demonstratio*: "demontratio ibi accipitur loco consilii." See the discussion in Tarello, "Profili giuridici," 369–70, and Tierney, *Idea of Natural Rights*, 62–63.

[99] Rufinus, *Summa decretorum* ad D. 5 d.a.c. 1, s.v. "Hec que de privil." (16), discussed the problem of the apparent mutability of natural law; he explained that only *lex* sometimes changed regarding *cerimonialia*, which was a common enough claim among decretists. Cf. id. *Summa decretorum* ad D. 6 d.p.c. 3, s.v. "His ita resp." (19).

[100] Rufinus, *Summa decretorum* ad D. 13 d.a.c. 1, s.v. "Item adv. ius nat." (31) and ad C. 1 q. 7 d.a.c. 6, s.v. "Nisi rigor" (234); the second passage is discussed by Weigand, *Die Naturrechtslehre*, 395–96.

[101] Rufinus, *Summa decretorum* ad D. 1 d.a.c. 1, s.v. "Humanum genus" (6): "demonstrat quod convenit, ut 'omnia in commune habeantur', ut: 'omnium una sit libertas', et huiusmodi." Cf. Tierney, *Idea of Natural Rights*, 138 and 167.

[102] Rufinus, *Summa decretorum* ad D. 1 d.a.c. 1, s.v. "Humanum genus" (7). The two are briefly discussed ad D. 1 c. 8, s.v. "Ius civile" (10) and s.v. "Ius gentium est" (10).

custom and enactment.[103] In "breadth," too, natural law surpasses the other *iura*. The example Rufinus gave had to do with property. Natural law of course recommended that all things be held in common, but by the *ius consuetudinis vel constitutionis* we now say things are mine or yours (*hoc meum est, illud autem tuum*).[104]

The recommendations of natural law can thus be diminished. Since nature neither forbids nor commands, but only shows that common possession is good, Rufinus is somewhat uninterested in explaining the modes of (first) acquisition of property, other than to point out that *res nullius* pass into the possession of the person who takes hold of them.[105] Yet, he cannot wholly resist explaining what happened. The dilemma was that *Dilectissimis* famously said that ownership came about "per iniquitatem" but it was also commonly understood that property existed on the basis of positive law—which natural law did not expressly oppose. Thus the objection:

> si iure constitutionis hec villa mea est, illa autem tua, cum ius constitutionis ius sit, relinquitur, quod iure villa ista mea, illa autem tua; si iure, tunc non ex iniquitate. Quid est itaque quod alibi habetur: quia per iniquitatem alius dixit hoc esse suum, alius illud? — ut infra C. 12 q. 1 c. 2.[106]

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[103] Rufinus, *Summa decretorum* ad D. 8 d.a.c. 1, s.v. "Differt quoque" (21): "In his tribus maxime ius naturale differt a iure consuetudinis et constitutionis, videlicet in origine, amplitudine et dignitate. Et quidem, quomodo origine discrepet, superius premissum est [ad D. 1 d.a.c. 1]; et qualiter in dignitate … quia quecunque de consuetudine aut constitutione iuri naturali contraria sunt, utique in mandatis et prohibitionibus, vana et irrita iudicantur.… Amplitudine quoque ius naturale a ceteris iuribus differt, quia iure nature omnia sunt communia, iure autem consuetudinis vel constitutionis hec villa mea est, illa autem tua."

[104] Weigand, *Die Naturrechtslehre*, 370, has suggested that *amplitudo* refers not to the actual scope of natural law, but its contents in the sense of an inner breadth, grandness, or loftiness, but this makes little sense to me. Natural law is "broader" because *all things* are common. Other laws do not make claims about all things, only about this or that thing. The *Glossa ordinaria* did not pick up on Weigand's interpretation either; see below, n. 166

[105] Rufinus, *Summa decretorum* ad D. 1 c. 7, s.v. "Acquis. eor. q. celo" (9): "quod enim in nullius bonis est, occupanti conceditur. Si quis vero velit in hoc loco magis supervacue quam fructuose ex traditione legum disserere de rerum acquisitione, quod modis fieri habeat, vel alia plura legistice traditionis documenta vexare occasione horum sequentium capitulorum, que de iuris forensis doctrina pro maiore parte descendunt, notum teneat: quisquis ille est conductor vane laudis, quin instar sacrilegii est canonici tractatus longum cursum extranearum legum inviis remorari."

[106] Rufinus, *Summa decretorum* ad D. 8 d.a.c. 1, s.v. "Differt quoque" (21): "if this estate is mine by the right of an enactment, and that one yours, since the right of an enactment is a right, it remains that the villa is mine by right, and that one yours; if by a right, then not by iniquity. And so, why is it that it is held elsewhere that, 'by iniquity,' one person says that this thing is his, [and] another person that that thing is his as it is below, in C. 12 q. 1 c. 2?"

Rufinus's solution involves two steps.[107] The first is that natural law got confused after Adam sinned, and that men then began to think nothing was illicit (*deinceps homines nichil putarent fore illicitum*). Post-Fall, the dignity of man was blunted and blinded, but the *naturalis vis* (here hardly used in an overly subjective way) was not entirely extinct in humankind.[108] And so people came together in an effort to distance themselves from animals by a *lex vivendi* just as they did by their knowledge. And so they developed "modest precepts" which recalled uncivilized humankind to decent and honourable treaties and taught them to enter upon trustworthy pacts. Whence the *ius gentium*.[109] Humans now had trouble with natural law, and needed help. It was reformed partially through the Decalogue so that illicit works, but not the worker's will, were condemned. With the Gospel, natural law was renewed in general. Because *lex naturalis* followed the bare nature of things, however, only showing that one thing was fair and another unfair, it was necessary to follow good customs for the modification and ornamentation of *ius naturale* so that a decent and appropriate order would be preserved.

The advent of private property seems to work in a similar fashion. Private property may not be necessary, but it is not iniquitous: "for what derived from a long usage is practiced now not by the perversity of iniquity, but by right of custom." Private property might first have been taken up due to a burning cupidity,[110] but what exists on the basis of long custom and the institution of laws, cannot be judged blameworthy.[111] This is precisely what

[107] The following is based on Rufinus, *Summa decretorum* ad D. 1 d.a.c. 1, s.v. "Humanum genus" (6–7). See also Weigand, *Die Naturrechtslehre*, 362–63, who remarked on how Rufinus developed Gratian's original position.

[108] See Ullmann, *Medieval Papalism*, 38–39, for other parallels.

[109] Rufinus, *Summa decretorum*, praefatio (4): "Cum itaque naturalis vis in homine penitus exstincta non esset, nimirum satagere cepit, qualiter a brutis animalibus, sicut prerogativa sciendi, ita et vivendi lege distaret. Dumque deliberavit homo cum proximis convenire et mutuis utilitatibus consulere, continuo quasi deinter emortuos cineres scintille iustitie, modesta scil. et verecundiora precepta, prodierunt, que agrestes ac feros hominum mores ad decora atque honesta revocare et concordie subire federa docuerunt et certas pactiones inire: que quidem ius gentium appellantur, eo quod illis omnes pene gentes utantur, sicut sunt venditiones, locationes, permutationes et his similes." Tierney, *Idea of Natural Rights*, 62 n. 67, read *naturale ius* instead of *naturalis vis* (cf. Weigand, *Die Naturrechtslehre*, 146 n. 17), but according to Singer's apparatus, only one manuscript had this reading, and it is not a particularly authoritative one; see Singer, *Summa decretorum*, XXIX. This reading is not present in Tierney, "*Ius* and Metonymy," 555.

[110] It is noteworthy that the *ius consuetudinis* is said to have arisen when Cain first built a city: Rufinus, *Summa decretorum* ad D. 7 d.a.c. 1, s.v. "Ius vero consuet." (20).

[111] Rufinus, *Summa decretorum* ad D. 8 d.a.c. 1, s.v. "Differt quoque" (21): "Sed sciendum quod, sicut exactio obsequiorum et dominatus premens per iniquitatem prius cepit a

the term *usucapio* refers to, the "adeptio dominii per continuationem iuste possessionis vel biennii aut alicuius temporis"—for so it is defined in the *Digest*.[112] The position Rufinus adopted regarding the advent of property also goes a long way to explaining ecclesiastical ownership. For, although everyone held things in common in the primitive Church, usucapion and the fact that there was not a precept (merely a counsel) against ownership, meant that clerics could have *propria*.[113]

*The* Summa "elegantius"

The *Summa "elegantius in iure divino" seu Coloniensis*, belonging to the Cologne area and dating from about 1169 provides another counterpoint to early decretist thought on the divisions of law.[114] The text is interesting in that it roughly follows Gratian's *Decretum*, but recasts it into an order wholly its own.[115] It begins with a consideration of *ius* replete with nods to Roman law: *Ius* is the "art of the fair and good" (*ars equi et boni*),[116] which divides into divine and human law. Divine law, as we have seen, is what is found in the law or Gospel; human law, on the other hand is an enactment (*constitutio*) of men whereby equity is preserved, injury repelled, innocence safe-guarded, violence reined in, and discord exiled.[117] The terms *ius diuinum* and *ius naturale* are also used in closely related but different ways.[118]

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Nemroth—sicut supra ex verbis Gratiani perpenditur, quod tamen, quia in longum usum derivatum est, non iam iniquitatis perversitate, sed consuetudinis iure exercetur: ita et quod aliquid proprium possideretur, ardente aliquorum cupiditate primitus factum est, quod tamen postea ex longevo usu et legum institutione inreprehensibile iudicatum est." See Weigand, *Die Naturrechtslehre*, 337–38, for sources and influence.

[112] Rufinus, *Summa decretorum* ad D. 1 c. 12, s.v. "de usucapionibus" (21): "the acquisition of lordship through the continuity of just possession, either of two years, or of some amount of time."

[113] Rufinus, *Summa decretorum* ad C. 12 q. 1, s.v. "Clericos nichil possidere" (320).

[114] Fransen and Kuttner, *Summa "Elegantius,"* xi, so date the text and call it a product of the French school. (References are to this edition.) The author is unknown, but the two leading candidates are Geoffrey of Cologne and Bertram of Metz; see Weigand, "Transmontane Decretists," 183–84. Brundage, *Medieval Canon Law*, 51, suggested it came from the "Rhineland school," but it is unclear why he thought this is so.

[115] Cf. Pennington, "Medieval and Early Modern Jurists," s.v. "*Summa 'elegantius'*."

[116] *Summa "elegantius"* 1.2 (1).

[117] *Summa "elegantius"* 1.4 (2). *Ius*, whether natural or moral, is perpetuated by writing or by use, i.e., by "constitutio" or by "consuetudo"; see *Summa "elegantius"* 1.10 (3).

[118] *Summa "elegantius"* 1.38 (10–11); see Weigand, *Die Naturrechtslehre*, 160, for comment.

But it is clear that the author understands this divine/human division to mean that a *ius* is divine if it concerns divine things and human if it concerns human things. In three *capitula*, he describes the types of human law:

> Qvid ivs natvrale. Ius humanum aut est naturale ut "quod instinctu nature apud omnes est, puta maris et femine coniunctio, liberorum successio, libera eorum que" in nullius bonis "acquisitio, uiolentie per uim" continuata et moderata "repulsio, depositi seu commodati restitutio." …
> Qvid ivs civile. Aut est positiuum, et hoc si cuius ciuitatis sit proprium ciuile dicitur, ut cultus numinum et cerimoniarum ritus specialis.
> Quid ivs gentivm. Sin diuersarum sit nationum, ius gentium uocatur, ut "sedium deuictarum occupatio, legatorum non uiolandorum religio, belli, captiuitatis, seruitutis, postliminii" et militie ius.…[119]

It is interesting that the author has changed the meaning of human law. Human law is natural or positive, depending on whether it is legislated by a *ciuitas* or by many *nationes*, in which case we call is *ius gentium*, or it derives from nature. It would seem, then, that *ius naturale* is sometimes part of positive human law.[120] This in turn means that we can have a "free acquisition of what is among no one's goods." This is clearly a modification of D. 1 c. 7: for in addition to emphasizing natural law's sanctioning of the free acquisition of *res nullius*, the author omitted to mention here the common possession of Gratian's text.[121]

Further on, however, when explaining how we should understand that the *ius naturae* is immutable, the author wrote that "indeed, by natural law,

[119] *Summa "elegantius"* 1.5–7 (2): "What is natural law. human law is either natural, such as 'what is among all people by the instinct of nature, for example, the conjunction of man and woman, the succession of children, the free acquistion of those things that' are among no one's goods, the continual and moderate 'repulsion of violence with force, and the restitution of a deposit or loan' [D. 1 c. 7].… What is civil law. Either it is positive, that is, if it is exclusive to one city, it is called 'civil,' such as the worship of the gods and the special rite of ceremonial things [cf. D. 1 c. 8]. What is the law of nations. However, if it is of diverse nations, it is called the 'law of nations,' such as the 'occupation of settlements, the obligation of not violating ambassadors, of war, captivity, servitude, postliminium [cf. D. 1 c. 9],' and military law [cf. D. 1 c. 10].…"

[120] Weigand, *Die Naturrechtslehre*, 157–58. Cf. *Summa "elegantius"* 1.8 (3): "Ius aut est naturale aut morale, utrumlibet [*or:* id est] diuinum uel humanum." The editors suggested *id est* might be better, which is also what Weigand reads.

[121] Cf. *Summa "elegantius"* 1.5, s.v. "Quid ius naturale" (2), with D. 1 c. 7: "Ius naturale est commune omnium nationum, eo quod ubique instinctu naturae, non constitutione aliqua habetur, ut uiri et feminae coniunctio, liberorum successio et educatio, communis omnium possessio et omnium una libertas, acquisitio eorum, quae celo, terra marique capiuntur; item depositae rei uel commendatae pecuniae restitutio, uiolentiae per uim repulsio. §. 1. Nam hoc, aut si quid huic simile est, numquam iniustum, sed naturale equumque habetur."

there is one liberty for all people, and a common possession of all things." The author chose these examples because they were evidently not unqualifiedly true in his day, and so served to introduce how one might understand natural law to be immutable. There were three possibilities. The first, that *ius naturale* is immutable so far as it has been put into writing, will recall a suggestion made by the *Summa parisiensis*.[122] Another idea, supposedly originating from Bulgarus de Bulgarinis (d. *ca.* 1166), one of the Four Doctors,[123] suggested that *ius naturale* may be individisible in genus and species, but not on individual matters such as liberty and possession. Bulgarus, in other words, had a 'permissive' understanding of natural law, which allowed general provisions to be overriden on specific matters. Another possibility, not quite as firmly attested, was that "the law of nature was immutable to the extent that a civil [law] is not enacted to the contrary."[124] Even more, our author suggested that *ius divinum privatum*—possibly a strange conflation of D. 1 c. 11, C. 19 q. 2 c. 2, and Dig. 1.1.1.2[125]—encourages one to have *nichil proprium*, to renounce everything for Christ.[126]

The distinction between private and public *ius diuinum* also accounts for the problem of how all things are common, yet someone can still say that a prebend or a church is 'his': the private *ius* refers to things being common, and the public *ius* to ecclesiastical possessions.[127] Similarly, although divine *ius* is more excellent (*prestantius*), this does not mean that there should be a common possession of all things *simpliciter*. *Ius diuinum*, here, contains perfection and advises this (*habet suasionem*), but human *ius* contains a command and thus has necessity. Therefore, a common possession does not generally and absolutely hold. After all, divine *ius* does not prohibit human *ius*'s command. Custom (*usus*), in fact, supports or favours human

[122] See above, p. 83 n. 85.

[123] See Brundage, *Medieval Origins*, 85–89.

[124] *Summa "elegantius"* 1.33 (9): "Iure siquidem naturali una omnium libertas et communis omnium possessio est. Hec autem per ius gentium immutata. Ad quod dicendum est quod ius naturale quatenus in scripta redactum immutabile. Vel sicut Bulgarus ait: 'Ius naturale in generibus et speciebus suis immobile, in indiuiduis non sic, ut in libertate, contra quam seruitus introducta, et similiter in communi omnium possessione, contra quam hoc meum illud tuum est. Vel ideo ius nature immutabile quia non quemadmodum ciuile in contrarium suum mouetur.'" See further Tarello, "Profili giuridici," 374. We might also note that the author seems to implicitly equate *ius naturae* and *ius naturale*.

[125] The editors suggest the *causa*, but the quotation bears reminiscences all three passages.

[126] *Summa "elegantius"* 1.39 (11): "Hic considerandum quod ius diuinum aliud est publicum, aliud priuatum, ut quod instinctu Spiritus Sancti cordibus perfectorum diffunditur, quale est nichil proprium habere, omnibus pro Christo abrenuntiare."

[127] *Summa "elegantius"* 1.40 (11).

*ius*.[128] The *Summa "elegantius"* thus makes use of the increasingly common idea that divine law can prohibit, command, or counsel certain courses of action.[129] A positive community of goods, according to divine law, is only counselled, not insisted upon. And, more importantly, human law does insist on the need for private property, which means that human law is the one that has the binding force.[130]

*Huguccio*

The last decretist I would like to consider is Huguccio (fl. 1180–1210), who is often considered one of the most influential, if not the greatest of the decretists.[131] His *Summa decretorum* (*ca.* 1188) is notable for the clarity of his arguments, and this can be seen in his treatment of natural law. Huguccio's predecessors had noted that *ius naturale* differed from other *iura*. This was true, Huguccio explained, in four ways: origin, dignity, breadth, and the rigidity of thought. Gratian spoke about the first two ways in the fifth *distinctio*, the third in the eighth, and the fourth in the thirteenth and fourteenth. However, his preface contains his most sustained treatment of *ius naturale*, and serves as the basis for all his subsequent comments. There, Huguccio described four principal meanings of *ius naturale*; at the same time, though, he insisted that natural law could only be considered immutable in the first two ways.[132] It could mean "reason," that is a natural power (*vis*) of the spirit

[128] *Summa "elegantius"* 1.41 (12): "Si quod iure licet humano, ob id licet absolute, fortius quod diuino, cum diuinum ius prestantius sit. Ad quod respondetur quod ius diuinum, secundum quod nunc de eo agitur, perfectionem continet et suasionem habet; humanum autem preceptionem, ideoque necessitatem. Proinde non sequitur quod si diuino iure, idest celitus inspirata perfectione, communis debeat esse omnium possessio, quod ob id generaliter et absolute sic esse debeat. Humano enim iuri usus fauet, ideoque secundum ipsum denominatio preualet. Item obicitur quotiescumque hec duo iura sibi aduersantur, illud seruandum esse quod dignius et cuius sanctior est auctoritas. Hoc autem de diuino iure uerum est. Ad quod respondendum quod preceptioni prohibitio, non permissio uel consilium, tota facie aduersatur, ideoque cum hoc permittat uel consulat dumtaxat ius diuinum, inhibeat autem humanum, non est contrarietas. Alioquin in iure dispensationes prohibitionibus contrarie fierent."

[129] *Summa "elegantius"* 1.38 (11); see also 1.76–77 (25–26) and 1.81 (27–28).

[130] See Weigand, *Die Naturrechtslehre*, 320–21. Of course, there is still an emphasis on the value and importance of alms-giving and other charitable works; see *Summa "elegantius"* 3.114–119 (168–71).

[131] Brundage, *Medieval Origins*, 107. See the first chapter of Müller, *Huguccio*, for biographical details; retold more briefly in Pennington and Müller, "Decretists," 143–48; see also Pennington, "Medieval and Early Modern Jurists," s.v. "Huguccio." References are to Přerovský, *Summa Decretorum*. However, on some of the problems of this volume, see Pennington, "Review of Oldřich Přerovský," 238–40.

[132] See Weigand, *Die Naturrechtslehre*, 215–19, for an extended quotation and discussion

by which one discerns good and evil,[133] or it might be a judgement of reason like a motion coming from reason directly or indirectly, which leads us to discern, choose, and do good works such as giving alms or loving God.[134] In the third sense, the inspiration and order of nature by which like are propagated by like is called *ius naturale*.[135] He linked this meaning with the common Roman law definition that natural law is what nature has taught all animals.

We are most interested in the fourth meaning.[136] In this sense, *ius diuinum*—what is contained in Mosaic and evangelical law—is called *ius naturale*. This is what the *Summa Natura*, or God, gave us. Or one might say this because "natural reason" induces us to what is contained in *ius diuinum*. *Ius* in this sense is improperly called natural law, for natural law, or rather reason, merely leads us to the *content* of natural law.[137] Following Rufinus, Huguccio argued that natural law existed in three parts: positive commands, prohibitions, and recommendations (*demonstrationes*). In short, natural law commands what is beneficial, prohibits what is harmful, and indicates or recommends what is expedient.[138] In terms of what natural law commands

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of this section.

[133] Huguccio, *Summa decretorum*, praefatio (7) : "Ius ergo naturale dicitur ratio, scilicet naturalis uis animi ex qua homo discernit inter bonum et malum, eligendo bonum et detestando malum. Et dicitur ratio ius quia iubet, lex quia ligat uel quia legitime agere compellit; naturale uel naturalis quia ratio unum est de naturalibus donis uel quia Summe Nature consonat et ab ea non dissentit." Cf. Weigand, *Die Naturrechtslehre*, 237.

[134] Huguccio, *Summa decretorum*, praefatio (7) : "Dicitur etiam secundo loco ius naturale iudicium rationis scilicet motus proueniens ex ratione directe uel non directe, id est quodlibet opus uel operari ad quod ex ratione tenetur homo, ut est discernere, eligere et operari bonum, dare elemosinam, diligere Deum et huiusmodi." As he went on to note, properly speaking this is rather an effect of natural law.

[135] Huguccio, *Summa decretorum*, praefatio (8) : "Item tertio modo dicitur ius naturale instinctus et ordo nature quo similia de similibus propagantur, quo similia similibus gaudent … et cetera faciunt que secundum sensualitatem, id est naturalem appetitum, habent fieri."

[136] Weigand, *Die Naturrechtslehre*, 237, did not think this mode (*Art*) played an important role for Huguccio; I am not convinced this is true. Once the idea shows up in Rufinus, it seems to have caught on; cf. Stephen Tornacensis, *Summa decretorum* ad D. 1 d.a.c. 1, s.v. "naturali iure" (7).

[137] Huguccio, *Summa decretorum* ad praefatio (8) : "item quarto modo dicitur ius naturale ius diuinum, scilicet quia continetur in lege mosayca et euangelica. Sic accipitur in principio et dicitur hoc ius naturale quia Summa Natura, id est Deus, nobis illud tradidit et docuit per legem et prophetas et euangelia, uel quia ad ea que iure diuino continentur naturalis ratio etiam sine extrinseca eruditione ducit et impellit. Vnde, si audacia detur uerbo, secure dico quod hoc ius improprie dicitur naturale, scilicet quia ad ea que in eo continentur naturale ius, scilicet ratio, impellit et ad ea ex ratione quis tenetur." See Tierney, "*Natura id est Deus*," 313–14, for a discussion of his use of *summa natura*.

[138] Huguccio, *Summa decretorum*, praefatio (9) : "Hoc ius consistit in tribus, scilicet in

or prohibits, natural law is firm and immutable, but its recommendations may be diminished or altered in part.[139]

The solution to the idea that all things are common by natural law is that this is merely one of its "recommendations," something that would be good, but it is not a command of *ius naturale*. It thus fits into the realm of what is sometimes called permissive natural law. In fact, Huguccio used this very terminology. At D. 1 c. 1, on the issue of it being *fas* but not *ius* to cross another's field, he wrote that although human law could prohibit what divine law permits, the two laws are not contrary. Diverse maybe, but not contrary. A permission, after all, imposes no necessity.[140] Simply put, things may be permitted by a higher law that are prohibited by a lower one.[141]

Huguccio's natural law distinction led to a number of different ways we might understand the idea that all things are common by natural law. It could mean that someone can have or lack individual possessions without sin.[142] Alternatively, it might mean that the judgement of reason approves that all things would have been common had not sin intervened. Due to sin, private possession was inflicted upon humankind as a punishment; a similar idea, Huguccio noted, could be found in theology.[143] A final possibility would

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preceptis, prohibitionis et demonstrationibus. Precipit quod prodest, ut: diliges Dominum Deum tuum; prohibet quod ledit, ut: non furaberis; demonstrat quod conuenit et expedit."

[139] Huguccio, *Summa decretorum*, praefatio (10) .

[140] Huguccio, *Summa decretorum* ad D. 1 c. 1, s.v. "non est ius" (23): "Set numquid, quia ius humanum prohibet quod ius diuinum permittit, ideo illa iura sunt contraria? Non. Diuersa quidem sunt set non contraria; quia quod dicitur: 'fas est,' loquitur de permissione, quia si preceptum esset, omnes astringeret; quod dicitur: 'ius non est,' loquitur de prohibitione. Permissio autem et prohibitio non sunt contraria.… Set numquid peccat iste prohibendo transitum per agrum priuatum, cum sit iure diuino permissum? Non, quia permissio nullam imponit necessitatem, set tantum liberam excitat uoluntatem." Cf. *Summa decretorum* ad D. 1 c. 7, s.v. "omnium una libertas" (37) and ad D. 8 c. 1, s.v. "diuinum ius" (125); see also Weigand, *Die Naturrechtslehre*, 271–72.

[141] Huguccio, *Summa decretorum* ad D. 1 c. 1, s.v. "non est ius" (22). At D. 3 d.p.c. 3, s.v. "ne fiant grauiora" (69–70), Huguccio expanded on Gratian by suggesting that, loosely speaking, there are three types of *permissio*; oftentimes, things are "permitted" in order to avoid even greater evils. For comment, see Weigand, *Die Naturrechtslehre*, 404–05.

[142] Huguccio, *Summa decretorum*, praefatio (11) : "Vnde et sine peccato quis potest habere propria uel carere propriis. Et secundum hoc eodem iure naturali et aliquid est proprium et aliquid est commune et aliquid est meum et aliquid est tuum." Cf. Weigand, *Die Naturrechtslehre*, 316–17. See also Rupp, "Remigio dei Girolami's *De bono pacis*," 52, although she exaggerated the differences between Rufinus and Huguccio on the origins of property.

[143] Huguccio, *Summa decretorum*, praefatio (11) : "Vel, iure naturali, id est iudicio rationis approbante; omnia sunt, id est esent [*sic*], communia nisi esset peccatum. Nam propter peccatum inflictum est homini in penam, ut cum de hoc possit dicere: hoc est meum, de illo non possit dicere: est meum, set: tuum uel alterius. Consimilis modus loquendi inuenitur

be that things are common by natural law in the sense that all things are to be shared in a time of necessity, for reason leads us to believe that we should only keep necessities and share the rest with our indigent neighbours.[144] Huguccio would subsequently connect this idea to the divine precept that tells us to treat others the way we would wish to be treated.[145]

Later on, however, Huguccio showed his disatisfaction with the idea that private property came about *per iniquitatem*.[146] His disatisfaction stemmed from the fact that *ius humanum*, in the last analysis, is *ius*. Thus, if things are possessed by human law, we should not say that property came about "through iniquity." After alleging *Quo iure* and *Dilectissimis* on either side of the question, he provided his solution. One possibility was that *iniquitas* merely referred to an overwrought concern for acquiring things: after all, without this concern, no one would say "this is mine." On the other hand, the phrase might mean "acquired through labour and solicitude" (*acquisitum per laborem et sollicitudinem*), where iniquity is connected to the *mammona iniquitatis* of Luke 16:9. Alternatively, we might take *per iniquitatem* to mean *per ius gentium uel ciuile*, which is wicked insofar as it is inequitable.[147] Lastly, it might actually refer to the sin of the first man, whereby being anxious to have things of one's own was inflicted upon humankind as a punishment. In other words, private property is not wicked in itself, and does indeed exist *iure*,[148] but that does not mean that it was not the result of our iniquitous, postlapsarian impulses, or that private property is an equitable arrangement.[149]

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in teologia." Cf. Weigand, *Die Naturrechtslehre*, 327. Töpfer, "Anschauungen," 304 n. 45, cited Hugh of St Victor's *Didascalion* 6.5, in Migne, *Patrologia latina* 176:805, as a example from theology; see also Eynde, "'Ius positivum' and 'Signum positivum,'" 43–44.

[144] Huguccio, *Summa decretorum*, praefatio (11–12) : "Vel potius, cum dicitur iure naturali omnia esse communia, non excluditur proprium nec dicitur commune contrarium proprii, set is est sensus: iure naturali, id est iudicio rationis approbante, omnia sunt communia, id est tempore necessitatis indigentibus communicanda. Naturali enim ductu rationis approbamus nobis tantum necessaria retinere, reliqua proximis indigentibus debere distribuere." See also Tarello, "Profili giuridici," 373, and Weigand, *Die Naturrechtslehre*, 329–30, whose text (§ 560) includes an added stress on the *tempus necessitatis*.

[145] Huguccio, *Summa decretorum* ad D. 1 c. 7, s.v. "communis omnium possessio" (35–36).

[146] This paragraph is mostly based on Huguccio, *Summa decretorum* ad D. 8 c. 1, s.v. "iure ergo humano" (127–28).

[147] Cf. Huguccio, *Summa decretorum* ad D. 1 c. 2, s.v. "quia iustum est" (24).

[148] Cf. Huguccio, *Summa decretorum* ad D. 8 d.p.c. 1, s.v. "naturali iuri" (131).

[149] Cf. Weigand, *Die Naturrechtslehre*, 340, 344, 346–47.

Huguccio did not only concern himself with why property ownership came about, he also reflected on how its first acquisition.[150] The starting point was a gloss to D. 1 c. 7, where Huguccio quoted with approval the idea that a *res nullius* is granted to the person who takes possession of it. As Huguccio saw it, a thing could be accounted as among no one's goods in five ways: by nature (e.g., a free man), by chance (e.g., inheritance before it is claimed), at a specific time (e.g., buried treasure), by fact (e.g., when something is considered abandoned), or in the people's opinion (e.g., just as *res sacrae* are considered no one's but God's). In short, "that which is among no one's goods is granted to the person who takes possession of it" is understood to be so either *re* or *spe*, either with respect to the thing itself or with respect to one's hope about the thing. Naturally, first acquisition can only occur in the case when things are actually (*facto*) among no one's goods, and, he added, only if the thing is fit to be occupied, not simply that someone occupies the thing (*si illud sit aptum occupari, non ut occupet*).

It seems clear that Huguccio thought natural law only recommended a positive community, while a negative community of goods actually existed—outside, that is, of extreme need. Aside from that special case, there was nothing to stop anyone from appropriating unclaimed property. In other words, in the current state of affairs, property tended to be individually owned, but was common with respect to use—at least when there was need.[151]

### *The* Glossa ordinaria

We must, finally, see what kind of light the *Glossa ordinaria* to the *Decretum* sheds on our subject.[152] As the *Glossa ordinaria* is a running commentary on the *Decretum*, we should expect it to conform rather conservatively to the contours delineated by Gratian; at the same time, however, it often provides some much needed clarity to the import of Gratian's overarching goal in any given *causa* or *distinctio*. Without the Ordinary Gloss, it is easy to lose sight of the forest for all the trees.

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[150] Huguccio, *Summa decretorum* ad D. 1 c. 7, s.v. "acquisitio eorum que celo" (38–39). The rest of this paragraph is based on this passage. See Weigand, *Die Naturrechtslehre*, 352–53.

[151] Tierney, *Idea of Natural Rights*, 139.

[152] The *Glossa ordinaria* is primarily the work of Johannes Teutonicus, compiled around 1215–18, and revised somewhat by Bartholomaeus Brixiensis around 1245. Bartholomaeus's revision was the dominant version beginning in the mid-thirteenth century. See Thompson and Gordley, *Treatise on Laws*, xvii, and Brundage, *Medieval Canon Law*, 207, 219–20. On the *Glossa ordinaria* to the *Decretum*, see especially Weigand, "Development of the *Glossa ordinaria*."

The Gloss holds to the traditional distinction between human and supra-human law as well as, in theory, between *ius* and *lex*. *Ius* is designated as such because it is *iustum*, though something may be licit even though it is not equitable.[153] *Lex*, on the other hand, commands what is *iustum* and prohibits the contrary; and it is called *lex* because it binds one by law.[154]

Due no doubt to the variety of similar-seeming accounts of what Gratian meant by *ius naturale*, we find a fair number of glosses discussing the matter—which hardly makes the matter straightforward. Natural law is immediately identified as *diuinum*,[155] but another gloss points out that *natura* is used in many ways. It might mean an innate force whereby like propagates like, it might be an instinct of nature that proceeds from physical desires such as appetite or procreation (cf. Inst. 2.1 pr.), it might be an instinct of nature that proceeds from reason, or it might refer to the "natural precepts," such as "do not kill."[156] We shall return to the significance of the third meaning momentarily, but it is again the fourth meaning which is of importance for the relationship of divine and natural law. In the fourth sense all divine law is said to be natural law. Another gloss makes a related point: under natural law, nothing is commanded or prohibited unless God wants it to be so. In short, there is nothing in Scripture that is not also among the *diuinae leges*, for these laws are consonant with nature. The Gloss concludes that

[153] *Glos. ord.* ad D. 1 c. 2, s.v. "ius generale": "Quia iustum est: nec iudex dicitur, nisi iustus sit: ut C. 23 q. 2 c. 1. Quandoque est aliquod ius quod non est aequum nec iustum." Cf. *Glos. ord.* ad D. 4 c. 2, s.v. "iusta": "Aliter enim non est ius nisi sit iustum: ut supra D. 1 c. 2."

[154] *Glos. ord.* ad D. 1 c. 3, s.v. "lex est etc.": "iustum praecipiens, et contrarium prohibens. C. 23 q. 4 c. 42, in fine. Et dicitur lex, eo quod legitime ligat. D. 2 de cons. c. 21. Archidiaconus [Guido de Baysio]."

[155] *Glos. ord.* ad D. 1 d.a.c. 1, s.v. "naturali": "id est, diuino."

[156] *Glos. ord.* ad D. 1 c. 7, s.v. "ius naturale": "Ad intelligentiam istorum nota quod natura multis modis dicitur: [1] quandoque dicitur natura uis insita rebus, similia de similibus procreans. [2] Secundo modo dicitur natura quidam stimulus seu instinctus naturae ex sensualitate proueniens ad appetendum, uel ad procreandum, uel ad educandum. C. 32 q. 5 c. 17; Dig. 25.4.1; Inst. 1.2 pr. [3] Tertio modo dicitur instinctus naturae ex ratione proueniens: et ius ex tali natura proueniens dicitur naturalis aequitas: et secundum hoc ius naturae dicuntur omnia communia, id est communicanda tempore necessitatis: ut D. 47 c. 8. [4] Quarto modo dicitur ius naturale praecepta naturalia, hoc est: Non furtum facies: Non moechaberis. C. 32 q. 7 c. 16. Inst. 4.1 pr. Et omne ius diuinum dicitur naturale ius. Et secundum istud ius similiter omnia dicuntur communia, id est communicanda. Bene enim fuit aliquid proprium de iure diuino. Nam ipsi Adae fuit dictum: In sudore uultus tui uesceris pane tuo [Gen. 3:19]. et alibi: Non concupisces rem proximi tui [Ex. 20:17]."

whatever is contrary to divine or canonical *lex* is also contrary to natural law and must be subordinate to natural law.[157]

The Gloss agrees that natural law must be immutable. It began to be perceived and is understood as beginning—insofar as it was then able to be understood[158]—with the appearance of rational creatures. Its age and immutability are two reasons for its priority among the types of *ius*.[159] The Gloss also picked up a previous solution to the problem of natural law's immutability. The Gloss confirms that natural law is immutable, at least with respect to its precepts and prohibitions.[160] Ultimately, it is a question of recognizing the difference between moral and symbolic precepts. A moral precept, such as do not kill, does not change. But symbolic precepts—the Gloss mentions the sacrifice of a lamb—might change their literal form, but not their meaning.[161]

Civil law receives much less attention in the Gloss, presumably because early decretists felt there was little that needed explaining. Simply put, civil law is what a people or *ciuitas* establishes as proper to themselves, for either the sake of humankind or God.[162] In a gloss to *Ius naturale* (D. 1 c. 7), we come across four definitions for *ius ciuile*. It might refer to all law that is neither natural law nor the law of nations—and in this sense canon law is considered civil law—, or it might refer to all law that is not canon law. In more specific uses, it could either refer to the law of the Twelve Tables or be used in contrast to Praetorian law.[163] The *ius consuetudinis* began at the

[157] *Glos. ord.* ad D. 9 d.p.c. 11, s.v. "Cum ergo": "Infert ex supradictis uel continuat ad inferiora hoc modo, cum in iure naturali nihil praecipiatur uel uetetur quam quod Deus uult fieri uel non fieri, et in canonica scriptura nihil aliud quam quod in diuinis legibus inueniatur: diuinae uero leges natura consistant: patet quod quae contraria diuinae seu canonicae legi inueniuntur, iuri naturali contraria sunt, et iuri naturali postponuntur. Et facit hic collationem iuris naturalis ad canonicam scripturam et diuinas leges."

[158] Cf. *Glos. ord.* ad D. 5 d.a.c. 1, s.v. "exordio."

[159] *Glos. ord.* ad D. 5 (Casus); cf. *Glos. ord.* ad D. 8 d.p.c. 1, s.v. "Dignitate" (Casus).

[160] *Glos. ord.* ad D. 5 d.a.c. 1, s.v. "sed immutabile."

[161] *Glos. ord.* ad D. 6 d.p.c. 3 (Casus): "Sed tamen non omnia quae sunt in lege et in euangelio, cohaerent iuri naturali quantum ad superficiem. Sunt enim in lege quaedam praecepta moralia: ut non occides etc. Ista non mutantur, nec ius naturale in eis. Quaedam mystica praecepta, ut de agno sacrificando, et his similia. Ista mutantur quantum ad superficiem, et non quantum ad hoc ius naturale immobile perseuerat et permanet sicut fuit ab exordio rationalis creaturae." Another gloss to this *capitulum* (s.v. "his ita[que]") explains that symbolic precepts may be either sacramental or ritual. Cf. Huguccio, *Summa decretorum* ad D. 6 d.p.c. 3, s.v. "His ita" (115–16); and *Summa parisiensis* ad D. 5 d.a.c. 1, s.v. "dignitate" (5).

[162] *Glos. ord.* ad D. 1 c. 8 (Casus): "Dicitur hic ius ciuile quod populus uel ciuitas sibi proprium constituit causa Dei uel hominum."

[163] *Glos. ord.* ad D. 1 c. 7, s.v. "ius naturale": "Similiter ius ciuile dicitur uariis modis. [1]

time of Cain, whereas the *ius constitutionis* began with Moses.[164] In any case, the Gloss reaffirms that civil law *consuetudines* or *constitutiones* contrary to natural law are not binding.[165]

The Gloss also has a lot to say about private property under natural law. The lack of private ownership under natural law is in fact listed as one of the reasons why natural law exceeds the other types of law in terms of scope.[166] Of course, it was not at all clear to everyone what this really meant. According to the gloss that lists four types of natural law, natural law in the sense of natural equity dictates that all things are common, which is then explained to mean that all things are common in times of necessity.[167] Another gloss to the same *capitulum* poses the problem quite nicely. Now, "communis omnium possessio" might mean that nothing belongs to a person by divine law, or merely that "common" means things are to be shared in a time of necessity.[168] The glosses to *Quo iure* generally support this picture, though Plato's community is glossed to mean that everyone "loved the other as himself," clearly passing up the opportunity to align Plato's city with the primeval condition of humankind or the early Christian community.[169] Otherwise,

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Quandoque dicitur ius ciuile illud ius, quod non est naturale, uel ius gentium. [2] Secundum hoc ius canonicum dicitur ius ciuile, secundum quod hic sumitur. Secundo modo dicitur ius ciuile omne illud non est canonicum ius. [3] Tertio modo ius ciuile dicitur lex xii. tabulae. Dig. 1.2.2.3. [4] Quarto modo dicitur ius ciuile ad differentiam iuris praetorii. Ioannes Teutonicus."

[164] *Glos. ord.* ad D. 6 d.p.c. 3, s.v. "ius": "Nunc ostendit a quo tempore coepit ius consuetudinarium et constitutionis: et dicit quod a tempore Cain coepit ius consuetudinarium: qui primo aedificauit ciuitatem, quam ex nomine filii sui uocauit Enoch. Sed ius constitutionis a Mose." Just before this, it is suggested that customary law began just after "natural custom": *Glos. ord.* ad D. 6 d.p.c. 3 (Casus).

[165] *Glos. ord.* ad D. 8 d.p.c. 1, s.v. "Dignitate": "Hic … ostendit quare ius naturale sit dignius quam alia iura. Nam quaecunque constitutio uel consuetudo est contra illud ius, est irrita." Cf. *Glos. ord.* ad D. 8 c. 2, s.v. "Sicut."

[166] *Glos. ord.* ad D. 8 d.a.c. 1, s.v. "Differt": "Nunc autem assignat differentiam iuris naturalis ad alia iura in amplitudine: quia hoc iure omnia sunt communia: sed non alio iure. Repetit etiam de dignitate. Dicitur ergo in hoc § quod hoc ius naturale differt a consuetudine et constitutione. Nam iure naturali omnia sunt communia. Et hoc probatur authoritate noui testamenti, et authoritate Platonis. Sed iure consuetudinis dicitur hoc meum: illud tuum."

[167] See p. 97 n. 156 above for the text. Weigand, *Die Naturrechtslehre*, 255–59 and 328–336, provides further examples and discussion.

[168] *Glos. ord.* ad D. 1 c. 7, s.v. "communis omnium": "id est nihil erat proprium alicui iure diuino. Uel dic communis, id est communicanda tempore necessitatis: ut D. 47 c. 8. Nam etiam secundum legem Rhodiam tempore periculi cibaria maxime erat communia: ut Dig. 14.2.2.2. C. 12 q. 1 c. 2."

[169] *Glos. ord.* ad D. 8 d.a.c. 1, s.v. "nescit": "Quisque enim tantum diligit alium ut se. Finxit enim Plato quandam rempublicam in qua omnia sunt communia. C. 12 q. 1 c. 2."

though, the glosses support the idea that private property exists only by *ius humanum*,[170] although there might be certain cases where a thing is possessed by divine law.[171] As far as first acquisition goes, another gloss to *Ius naturale* (D. 1 c. 7), pointing to the *Institutes*, explains that goods belonging to no one go to the first person to possess them.[172]

Some generalizations are in order. The *Decretum*'s account of natural law incidentally described what Pufendorf would call a positive community under natural law, which was no longer in evidence. The decretists had to explain this anomaly, and they were under greater pressure to do so than the civilians because Gratian had insisted that natural law had precedence over civil law. The general solution most decretists adopted, albeit to varying degrees of explicit completeness, was to argue that natural law only encouraged a positive community, but the actual state of affairs, at least post-Fall, was a negative community where no one owned anything and all was up for grabs. The *Summa parisiensis* was an exception in that its author thought a positive community existed by divine law where God held all property and humans were mere *usufructuarii*. Rufinus represents an important stage in the development of ideas about natural law, which had important consequences for how property was understood to have arisen. natural law did not only command or forbid things; in many cases it only recommended what would be best. natural law was thus able to be considered immutable and yet permit things like property to be commonly or privately owned. As Huguccio noted, a common, positive community would have reigned still, if not for the first sin; but it was now acceptable for private property to exist, and it did so justly if not entirely equitably. In many ways, the Michaelists would cleave to this general picture, as the remainder of this chapter and the next will show.

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[170] *Glos. ord.* ad D. 8 c. 1 (Casus): "Quidam haeretici conquerebantur se iniuste expoliatos rebus quas nomine ecclesiae possidebant: contra quos inuehit Augustinus dicens eos non posse conqueri. Nam aut possident iure diuino, aut iure humano. Si iure diuino, omnia sunt communia: et ita res ecclesiae possidere non possunt. Si iure humano: sed iura humana sunt leges Imperatorum, quae statuunt ut haeretici nil nomine ecclesiae possiderent. Si ergo renuntiant legibus Imperatorum, per consequens et possessionibus: siue nomine ecclesiae uel proprio nomine uelint possidere: cum apostolus reges praeceperit honorari."

[171] *Glos. ord.* ad D. 8 c. 1, s.v. "nam iure diuino": "Ex hoc uidetur quod tantum iure humano aliqua possideantur, et non diuino. Et sic obstat infra C. 23 q. 7 c. 1 ubi dicitur quod iure diuino aliquid possidetur." The gloss goes on at some length to resolve this apparent paradox. Cf. Huguccio, *Summa decretorum* ad D. 8 c. 1, s.v. "Domini est" (126).

[172] *Glos. ord.* ad D. 1 c. 7, s.v. "capiuntur": "Haec enim et alia quae in nullius bonis sunt, cedunt ocupanti: ut Inst. 2.1.12."

## 2. *Bonagratia of Bergamo*

Bonagratia is in a number of ways the bridge between the earlier canonistic discourse we have been considering and the mature Michaelist position that developed in the wake of *Quia vir*.[173] As one of the principal voices of the Community in the previous decade, he had already spend a great deal of time thinking about the nature of Franciscan poverty.[174] No less importantly, Bonagratia had studied law, and knew it well. He was, therefore, a crucial conduit for the importation of legal concepts and arguments. It remains to be seen how much his early appeals influenced the later texts.[175]

Bonagratia situated his doctrine of *ius naturale* primarily in the early distinctions of the *Decretum* and the corresponding sections of the *Corpus iuris civilis*. Natural law began from the beginning of rational creatures, and is held by all from instinct of nature, not enactment. It cannot, moreover, be dispensed with or changed, for *naturalia iura*—which are observed equally by all—endure by means of "a certain ever-strong and immutable divine providence."[176] Specific features of natural law include the indispensable command to (take steps to) preserve one's own life,[177] and that God specifically commanded our first parents to use some things and not use others—for to eat is in some sense to use.[178] Extreme necessity is described as not subject to canon or civil *lex*, a fact that is admitted by both canon and civil *ius*, not to mention *lex imperialis*.[179]

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[173] Cf. Miethke, "Paradiesischer Zustand," 527–28.

[174] A useful thumbnail sketch of Bonagratia's polemical activities can be found in Oliger, "Tractatus de paupertate," 293–304. For Bonagratia's pre-*Ad conditorem* activities, the definitive study is Wittneben, *Bonagratia von Bergamo*, 17–106.

[175] Bonagratia's views are summarized in Callahan, "William Ockham and Natural Law," 44–49, 55–56.

[176] *De paup.*, 503: "Preterea usus facti rerum necessariarum ad substentationem nature est de iure naturali, eo quod 'ab exordio rationalis creature incepit,' D. 5 d.a.c. 1, et D. 35 c. 8(!), et eo quod ubique et apud omnes instinctu nature, non ex constitutione aliqua habetur, ut in *Decreto*, D. 1 c. 7, et eo quod 'natura' hunc usum 'omnia animalia docuit,' Inst. 1.2 pr., et Dig. 1.1.1.3. Et ideo nec per legem nec per renuntiationem sive abdicationem nec aliquo modo tolli vel mutari potest, quia 'naturalia iura, que apud omnes pereque servantur, divina quadam providentia constituta semper firma atque immutabilia permanent,' D. 5 d.a.c. 1 et D. 6 d.p.c. 3; etiam Inst. 1.2.11." (The phraseology for "quia naturalia iura…" comes from the last citation.) The thrust of the parallel passage in *App. ACC*, 102–03, is quite different.

[177] *De paup.*, 503–04.

[178] *De paup.*, 504.

[179] *De paup.*, 505: "Quia neccessitas huiusmodi [sc. extrema] non subiacet legi canonice vel civili, X 3.46.2; X 1.4.4; X 5.41.4." *De paup.*, 504: "Preterea, constat quod tam de iure canonico quam civili, quod tempore necessitatis extreme omnia spectantia ad huiusmodi vite

Bonagratia is as hazy as everyone else about the nature of the relationship between divine and natural law. The terms often appear together, and thus generally seem roughly synonymous in the sense that if something is permitted or prohibited by natural (or divine) law, it is also naturally prohibited by divine (or natural) law.[180] Yet in some sense they are meant to be separate. When they are meant to differ, the impression one gets is that divine law is *positive* divine law. Thus all things belong to the Church of all the faithful *de iure divino*,[181] but to insist this is necessarily or always the case would be to press Bonagratia's texts too far. For instance, if *ius diuinum* always meant positive divine law, it would mean that the common possession of everything was a positive command, which would have to be revoked in order for possession by civil law to be valid. This is not a point Bonagratia ever made. We are left with the impression that sometimes natural law and divine law were meant interchangeably, sometimes not. If he thought of them as truly distinct, he must have assumed it was self-evident which sense he meant.

Property rights—possessions, properties, and lordships—all come from *ius humanum* of course. Bonagratia argued that a *ius privatum*, an exclusive right, like usufruct or a right of using belongs to someone by human law. And a *ius privatum*, unlike things which derive from divine law,[182] is renounceable.[183]

The use of *ius privatum* will remind an attentive reader of the Roman law distinction between private and public *ius*.[184] The canonists were aware of this distinction of course, but they generally paid it less attention in their discussions of natural law. In this Bonagratia seems to be following the canonistic vein, for he clearly meant what we would call a "private right,"

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substentationem sunt omnibus hominibus mundi huius communia, ita quod nemo potest dicere hoc proprium esse, quod tempore huius necessitatis omnibus hominibus est commune, et sunt communia, D. 47 c. 8.… Lex etiam imperialis dicit quod tempore huius neccessitatis cibaria omnibus hominibus sunt communia, Dig. 14.2.2.2."

[180] See, e.g., *App. ACC*, 102–03.

[181] *App. ACC*, 93: "Cuius Ecclesiae fidelium omnium de iure divino omnia sunt, ut habetur C. 23 q. 7 c. 1; et 1 Cor. 3:22: *Omnia vestra sunt*; et C. 23 q. 7 c. 3."

[182] See, e.g., *App. ACC*, 94: "Et tali communitati quae emanat a iure divino, C. 12 q. 1 c. 2, non est licitum renuntiare." This seems a clear allusion to Bonaventure's discussion of the four different communities of goods; see the text in Appendix A.

[183] *De paup.*, 503: "Proprietates vero et posessiones et dominia rerum sunt a iure humano, D. 8 c. 1; usufructus etiam et ius utendi est a iure civili, in Inst. 2.2, per totum. Certum est autem quod omni iuri privato, quod alicui competat ex humano iure, potest quis reuntiare et illud a se penitus abdicare; unde Esau ex quo semel renuntiaverat iuri primogeniture, ad illud redire nunquam potuit, C. 7 q. 1 c. 8, Dig. 21.1.14.9, cum similibus."

[184] See above, p. 69.

or what John XXII once described as a "ius personale."[185] The Michaelists would tend to follow Bonagratia on this point, as in their theories of the categories of law, although the emphasis was often quite different.

## 3. *Michael of Cesena*

Michael of Cesena was no different from most other medieval authors in that he used *ius* in such a way that we are obliged to translate the word with 'law' or 'right' depending on the context. At one point he even wrote about a *ius sive lex utendi*, though here the context seems to be meant to specify that Christ was above not a (subjective) right of using so much as above the actual law or rule as it was legislated—whether in natural or positive law.[186] In general, however, the term *ius* was the one upon which the poverty controversy turned, and thus it was the term that was employed most frequently.

### 3.1. Ius *as Law*

Michael repeatedly referred to divine, natural, and human *ius*,[187] but tended to treat divine and natural law as synonymous according to a reference to Gratian.[188] The chief distinction was between divine and human law: in the *Appellatio minor*, for example, he concluded that John's heresies were proven through the reasons and allegations of divine and human *ius*.[189] Similarly, those who wished to imitate the life of Christ and the apostles renounced the *iura imperatorum*, content with *ius naturale et divinum*.[190] Michael could thus quote the *Digest* with approval: "The highest division of things breaks

[185] See above, p. 50.

[186] *App. maior*, 354: "Christus fuit supra ius siue legem utendi, vendendi et donandi ac alias res ex aliis adquirendi."

[187] Michael, naturally enough, described Jesus Christ as the principal origin and foundation "omnis iuris naturalis, divini, civilis et canonici": *App. maior*, 356; cf. 404.

[188] *App. maior*, 264: "Ergo de iure divino, quod dicitur ius naturale, D. 1 d.a.c. 1." A better reference would be to D. 1 d.p.c. 1: "Ex uerbis huius auctoritatis euidenter datur intelligi, in quo differant inter se lex diuina et humana, cum omne quod fas est, nomine diuinae uel naturalis legis accipiatur, nomine uero legis humanae mores iure conscripti et traditi intelligantur." At *App. maior*, 257, he wrote that John's position on consumables opposes "omni iuri divino et canonico et civili," which seems to suggest a basic division between positive and non-positive law—though this cannot be the full story since some divine law may also be positive in nature. Cf. *App. ACC*, 100; see also Dolcini, "Il pensiero politico," 158.

[189] *App. minor*, 450.

[190] *App. maior*, 241; cf. Dolcini, "Il pensiero politico," 160.

down into two: for, some things are of divine law, others of human."[191] But as the earlier reference to D. 1 c. 1 shows, Michael was well aware that both canon and Roman law drew a sharp distinction between human and divine law.

One important feature of divine law was that it was the basis on which certain types of communities could exist. Greatly expanding upon and modifying Bonaventure's fourfold community of temporal goods,[192] Michael noted that the second type of community, which emanates *only* from divine law,[193] is the one by which all things belong to the just (with respect to use, that is).[194] One can understand the primitive Church's collective holding of goods on the basis of this *communitas*.

The precise nature of natural law is perhaps even less easy to specify. For instance, while arguing that whatever the apostles left, it was not done by natural and divine *ius*, and that John's definition of use does not even exist by natural and divine law (*lex*), he explained John's sort of use, an *usus proprius*, was from neither the *lex naturalis* of *Dilectissimis* nor the *lex divina* of *Quo iure*.[195] In general, however, Michael tended to use the term when he was writing about the state of innocence, that is, before the fall of Adam and Eve, or in situations that, imperfectly, hearkened back to this state; in this case, *ius naturale* and *ius naturae* tend to be used interchageably. Thus we find that Michael described the state before sin as the "status innocentiae sive legis naturae," which, as we shall see, was also before the advent of

[191] *App. mon.*, 842, citing Dig. 1.8.1 pr.: "Summa rerum divisio in duo dividur, nam aliae sunt divini iuris, aliae humani." Cf. *App. maior*, 294, where, in the midst of a proof that Nicholas III did not promulgate novelties in *Exiit*, he wrote that "in multis aliis exemplis iuris divini et humani potest hoc faciliter reperiri." Or: *App. maior*, 241, where he described the religious who wish to imitate Christ and the apostles as people (*iure naturali et divino contenti*).

[192] The texts are compared in Appendix A.

[193] *App. maior*, 348.

[194] *App. maior*, 337.

[195] *App. maior*, 401: "Et constat quod non reliquerunt illud quod est a iure naturali et divino, sine quo humana natura sustentari non potest, videlicet usum alimentorum, qui est a lege naturali et divina, ergo omne illud ius reliquerunt quod non est a lege naturae et divina. Sed usus, qui est ius utendi in rebus ⟨alienis⟩ salva rei substania [*sic*], a iure positivo introductus est, sicut obligatio et haereditas etc., in Inst. 2.2.1. Et talis usus iuris ex quo competit ius agendi in iudicio, dicitur usus proprius, non est a lege naturali, ut in dicto C. 12 q. 1 c. 2, nec a lege divina, D. 8 c. 1." Although Michael used *lex* here, this seems to be more to distinguish between, to use modern terminology, objective law and subjective rights. It is perhaps best to think of it this way, *ius* may sometimes mean "law," but *lex* never means "right(s)"; e.g., *App. maior*, 251: "secundum leges et iura positiva." Similarly it is more usual to use *lex* when writing about the "Old Law" and the "New Law"; cf., e.g., *App. mon.*, 638 and 781.

proprietary lordship.[196] According to the gloss, Michael pointed out, the state of nature was contrary to that introduced *per iniquitatem*.[197]

Perhaps the defining characteristic of natural law for Michael was its immutability. The fact that it did not change was even used to prove that although the apostles claimed to have left everything behind in Matthew 19:27, we know that this could not have included leaving behind the use of all things. After all, not only did the apostles continue to use things after Peter made this claim, it was actually impossible to relinquish all use:

> quia usus rerum necessariarum ad vitae humanae sustentationem cadit sub praecepto legis naturalis et divinae per quod ad esse naturae conservandum quilibet est indispensabiliter obligatus.[198]

Another related example is that of natural law, *ius naturale*, not being subject to "the law," *lex*, in times of necessity. Ockham would dwell on this at greater length, but Michael was content to explain that this is what Nicholas meant when he declared that the friars had, *iure poli*, a means by which they could provide for themselves in times of necessity, "since necessity is exempt from every law."[199]

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[196] *App. maior*, 239; cf. 254. As Dolcini, "Il pensiero politico," 158–59, has noted, for the Michaelists the state of innocence and the state of nature are essentially synonymous.

[197] *App. maior*, 239, quoting both glosses to C. 12 q. 1 c. 2, s.v. "per iniquitatem": "Per iniquitatem, id est per consuetudinem iuris gentium, aequitati naturali contrariam; vel 'per iniquitatem,' id est per sollicitudinem, ut ibi: *Facite vobis amicos de mammona iniquitatis* [Lc. 16:9]." Both these ideas are found in Huguccio; see p. 95 above. Cf. the almost identical passage in *Impug.* § 7 (245). This text is quite possibly an early compilation of Ockham's attacking John's pre-*QVR*, bulls. It reads almost like a dossier of notes. Lambertini, "Natural Law" 3:1626 n. 3, doubted Ockham's authorship, but unfortunately did not give any reasons for his opinion. The work is clearly that of a Michaelist, and, I would argue, definitely not the work of a jurist: occasionally, where the text quotes from the *App. maior*, it even omits the Roman law citations Michael's text includes—which is similar to what we see in the *Improbatio*. See below, p. 295 n. 21 for one example; here, cf. *OND* 92.9–63 (2:669–70); 87.32–35 (2:653).

[198] *App. maior*, 232: "for, a use of things necessary for sustaining human life falls under a precept of natural and divine law; by this precept, everyone is indispensably obliged to conserve the being of his nature."

[199] *App. maior*, 336–37. In such a case, even a thief licitly uses a thing, though "in tali re non habet ius proprium a iure positivo sive civili inventum" (336). In fact, the maxim is found in the *Regula non bullata* 9.16 (Esser, *Opuscula*, 260–61) in precisely the same context: "Similiter etiam tempore manifestae necessitatis faciant omnes fratres de eorum necessariis, sicut eis Dominus gratiam largietur, quia necessitas non habet legem." Not that the Franciscans were innovators on this point: Roumy, "L'origine et la diffusion," has shown that the idea underlying *necessitas non habet legem* was common to five branchs of medieval learning by the end of the twelfth or early thirteenth century.

One of the many sources for Michael's belief that necessity was exempted from all law was in his appropriation and elaboration of Bonaventure's description of the fourfold community of goods. For Bonaventure the first type of community was one that existed "ex iure necessitatis naturae," and it was on the basis of this need—in extreme necessity—that something which had been appropriated by one person became another's (*illius fiat*). One cannot, he concluded, renounce this community.[200] In Michael's hands the account changed somewhat: the first community still emanated "a iure necessitatis naturae," but it was now on the basis of the law—*quo iure* instead of *qua* (*necessitate*)—that one could licitly use them in extreme need, even, he added, without the will or licence of the owner.[201] Thus it was also the case that the use of food in the state of innocence (as it related to preserving one's life) was imposed "sub praecepto divino."[202]

Michael relied on the commonly perceived divide between natural/divine and positive law.[203] It gave the Michaelists room to describe actions that existed outside of the sphere of positive law. It was the pope's apparent confusion about where to draw the divide or the unwillingness to recognize that there was a divide that was one of the Michaelists' central complaints.[204] Proprietary lordship could of course be grounded in positive law just as well as it could be grounded in divine or natural law, a point which we shall discuss in more detail in the next section. But positive law also served as the basis for the third (modified) Bonaventuran "community of temporal goods." This community emanates "from the law of worldly government" (*ex iure civilitatis mundanae*), which is the means by which a group of people become one community. The point was that "talis communitas includit etiam personalem proprietatem in rebus communibus, emanantem ex iure humanitus instituto."[205] Amid a mass of citations to the *Digest*, Michael explained that this did not mean things were individually owned in the

[200] *Ap. paup.* 10.13 (BOO 8:309a); see p. 321, below.

[201] *App. maior*, 335–36. Neither Francis nor William took up this strand of Michael's thought.

[202] *App. maior*, 256.

[203] Lambertini, *La povertà pensata*, 212; cf. his "Poverty and Power," 143.

[204] Cf., e.g., Michael's claims at *App. maior*, 335, about *QQM*. This was also a central claim of Bonagratia in his *De paup.*: that the question John had asked about the poverty of Christ and the apostles had to about "having" by "ius dominii vel quasi dominii seu proprietatis" rather than either 'having' *de facto*, or 'having' in the sense of having the administration of ecclesiastical goods. See his *De paup.*, 324–27, discussed on p. 177, below.

[205] *App. maior*, 338–39: "such a community includes even personal ownership in the common things, which issues from a law created by humans."

normal sense, but that people of the community (or corporation) would have a claim to a share if the community were dissolved.[206]

### 3.2. Ius *as Right*

Anyone familiar with Ockham's political writings will have come across his contention that no one should be deprived of their right without cause or fault.[207] The kernel of this idea can first be found in the *Appellatio monacensis*, but it is not at all clear that this was Ockham's source. Unlike Ockham, who was speaking about a positive law-based right in general, Michael was making a point about the nature of monastic poverty. Contrary to John's belief that the vow of a religious could not extend to consumable necessities, Michael argued that monks only had necessities with respect to use or the ability to use (*quantum ad usum sive facultatem utendi*), for they were unable to sell or otherwise alienate these things as they pleased. For, if they could alienate these goods, then, in accordance with civil and canon law, they would be in effect lords of these goods, and abbots would not be able to prohibit the monks from doing whatever seemed good to them, "quia re propria et potestate faciendi de ea quod placet nullus privandus est sine culpa sua."[208] It is but a small step to go from a *potestas faciendi* to a subjective understanding of *ius*.

Rights come in the basic flavours. A natural right was something that existed by virtue of natural law, which is why the terms are virtually interchangeable and are indeed often translated that way. In the context of the poverty controversy only one natural right was ever properly discussed, namely the right in extreme necessity to use another's goods for the purpose of sustaining one's own life. The rationale is simple:

> Unde tempore talis necessitatis qui auferret ab alio rem etiam contra ipsius voluntatem, furtum non committit, et licite utitur tali re, et tamen in tali re non habet ius proprium a iure positivo sive civili inventum. Et de hoc iure dicit canon D. 47 c. 8, ubi loquens de tempore huiusmodi necessitatis, dicit [*sic*]: "Nemo dicat proprium quod est commune." Et huic communitati sive iuri non est possibile renuntiare pro eo quod manat a iure naturaliter inserto homini.… Nec huic iuri potest derogari per aliquam legem, quia necessitas talis non subiacet legi, X 3.46.2; et X 1.4.4; et X 5.41.4, in textu et glossa. Ex hoc

[206] *App. maior*, 339.

[207] See below, pp. 118 and 310.

[208] *App. mon.*, 815–16, citing D. 56 c. 7 and C. 16 q. 7 c. 38: "for no one is to be deprived of his own things and the power of treating them as he pleases without fault."

> iure apostoli emerunt ad victum necessaria [cf. Io. 4:8; Lc. 9:52] … quia, … tale ius est ius naturale, quod non subiacet legi.[209]

The natural right that supersedes other claims *in extremis* derives from the first community Michael described in the previous section. This community, which exists "by the right of the necessity of nature" (*a iure necessitatis naturae*) is thus one that exists potentially at all times, though the point is that its laws (now) only supersede at the time of necessity. When the need is dire, however, one may take the necessary steps to preserve his or her life; the right to do this, moreover, is irrenounceable.

The quoted passage also touches upon positive rights. Unlike the natural rights, which can be hard to distinguish semantically from natural law, a *ius proprium*, a personal or exclusive right, is an invention of positive law (*ius humanum vel civile*). Due to his reliance on Bonaventure's model, Michael in fact described two communities in which positive rights exist. These are the civil and ecclesiastical communities. A civil community is one which emanates from the "law of worldly government," which is the means by which any group, from a *societas* to a kingdom, becomes a *communitas* or *respublica*.[210] Personal property is a key feature of this community. Though Michael admitted that, in legal circles, it was typical to conceive of the lordship and ownership of the things of a civil and mundane community as shared rather than individual, nevertheless, *secundum quid*, individuals do have individual ownership. The rationale was based on a passage in the *Digest*: at the dissolution of a corporation or community, the property is to be divided between its members. Alternatively, one who left the community could seek his share or portion. Therefore, he concluded, everyone in this sort of community or college is said to have a *proprium ius personale* to the common things of a college.[211] In fact, the force of the argument here closely corresponds to

[209] *App. maior*, 336–37: "Hence, in a time of such great necessity, he does not commit theft who takes something away from another, even against his will; and he licitly uses the thing, even though he does not have an exclusive right over it that is derived from positive or civil law. And about this right, the canon D. 47 c. 8, speaking about such a time of necessity, says, 'No one calls what is common his own.' And it is impossible to renounce this community or right because it derives from the law naturally implanted in human beings. Nor can this right be diminished by another law, for so great a necessity is not subject to law: X 3.46.2, X 1.4.4, and X 5.41.4, in text and gloss. The apostles bought things necessary for nourishment by this right…, for, … such a right is a natural right, which is not subject to law."

[210] See p. 106 above.

[211] *App. maior*, 338–39: "Et talis communitas includit etiam personalem proprietatem in rebus communibus, emanantem ex iure humanitus instituto, nam quamvis res communitatis civilis et mundanae absolute non censeantur esse singulorum, sed sint actu universitatis,

a gloss of one of the *Digest* passages given by Michael.[212] Thus, although Bonaventuran in inspiration, Romanist corporation ideas shaped the point about having a personal stake of ownership in the common goods of the community.

Michael's final type of community is ecclesiastical, emanating from the ecclesiastic right that was introduced by the endowment of the Church (*ex iure ecclesiastico ratione dotationis Ecclesiae introducto*).[213] It is obviously meant to be a sort of middle ground between the third and second communities—the fact that it only includes communal *quasi proprietas*, what I shall call restricted ownership, only makes this more evident. Yet it is equally clear that this is a community based in positive law at least in terms of its "almost" ownership.[214] Michael went on to explain what he meant by *ius ecclesiasticum*:

> Ex hoc iure ecclesiastico bona Ecclesiae divisa sunt per ecclesias diversorum locorum auctoritate summorum pontificum, et ecclesiae limitatae et episcopis et aliis praelatis in ecclesia concessa est administratio.[215]

The goods of the Church are divided amongst the churches on the basis of this "ecclesiastical right," and it is the source of the authority to manage granted to the churches, bishops, and other prelates. The fact that church officials only had restricted ownership meant that, unlike the civil community just described, although any cleric of the church could sue in court for its possessions,[216] these possessions would not be divided amongst its members if a church or religious group were dissolved:

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quoad proprietatem et dominium, Dig. 1.8.6.1; et Dig. 2.4.10.4. Et quod debetur universitati, singulis non debetur, Dig. 3.4.7.1, quia tamen secundum quid sunt, quia si dissolveretur communitas illa, communes pecunias dividunt inter se, et quilibet potest petere partem suam in illo debito quod communitati debebatur. Similiter posset petere partem suam quicumque ex legis concessione recederet ab illo collegio, Dig. 47.22.1.2; et Dig. 47.22.3. Et tali respectu quod est collegii, dicitur esse singulorum, ut haec plene dicuntur et notantur Dig. 47.22.1, in glossa ordinaria. Ideo cuilibet de tali communitate sive collegio dicitur competere proprium ius personale in rebus communibus illius collegii."

[212] See *Glos. ord.* ad Dig. 47.22.1, s.v. "competit" (and ad Dig. 1.8.6.1, s.v. "veniam"), which also refers the reader to Dig. 2.4.10.4 and 3.4.7.2; although the second reference does not apply in this context, 3.4.7.1 does and was cited by Michael.

[213] *App. maior*, 340.

[214] The other source for this community is *ius divinitus institutum*: *App. maior*, 342.

[215] *App. maior*, 340: "By this ecclesiastic right, the goods of the Church were divided through the churches of different places on the authority of the popes, and the administration was granted to determinate churches, bishops, and other prelates in the Church."

[216] *App. maior*, 342: "unusquisque clericus ecclesiae collegiatae habet actionem ad res

> Et quia pro ipsis domibus, praediis, possessionibus et bonis quae in communi habent, ipsi communitati datur actio et exceptio in iudicio, dicuntur in bonis ipsius communitatis esse, Dig. 41.1.52. Ideo talis communitas dicitur habere quasi proprietatem et dominium utile, quia sic agere et facere videtur in talibus ut dominus in re propria facere consuevit, et tamen talis proprietas et tale dominium non est proprietas et dominium civile et mundanum, quia si dissolveretur talis communitas, non dividerentur inter illos de illa communitate ecclesiastica illa bona, immo redirent ad Ecclesiam catholicam quae est congregatio fidelium, et essent in dispositione summi pontificis, quia Deo dedicata fuerunt, sicut expresse habetur VI 3.17.1.[217]

The point about an "action in court" is highly signficant. It was, for the Michaelists, one of the key criteria for a positive law property right—what the Michaelists insisted their order did without. In some ways it was *the* deciding characteristic of positive law rights. When, for example, Michael turned to explaining what John XXII had meant by the claim that an *actus* could not be licit if it were not just, which meant one had to have at least either a right of using for non-consumables or (a right of) lordship for consumables, he wrote that the pope had to mean a "civil and worldly right of using: of the kind that is an exclusive right for which an action is given in court."[218]

Michael's understanding of *ius* was much closer to the modern layperson's understanding of "right" than to classical Roman law, which did not distinguish between procedural and substantive law. While John argued

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ecclesiae suae recuperandas et exceptionem ad defendendas."

[217] *App. maior*, 341: "And because an action and exception in court is given to that community for those houses, estates, possessions, and goods that they hold in common, they are said to be among the goods of that community. Dig. 41.1.52. Therefore, such a community is said to have quasi-ownership and *dominium utile*, for it seems to act and do in such matters as a lord is accustomed to do in his own affairs; and yet such ownership and lordship is not civil and worldly ownership and lordship, for if such a community were dissolved, the ecclesiastical goods of the community would not be divided among them, but would rather to return to the Catholic Church, which is the congregation of the faithful, and would be under the management of the highest pontiff, for they had been dedicated to God, just as it expressly held in VI 3.17.1." Michael went on to quote from the commentaries of Innocent IV and Hostiensis; see Innocent, *Comm.* ad X 2.12.4, nn. 3–4 (222ra–b), and Hostiensis, *Comm.* ad X 2.12.3(4), nn. 3–4 (42va). Feenstra, "Les origines" is the classic study of *dominium utile* in medieval thought. Briefly, it is simply a form of lordship that is—as Ockham would say—less than *dominium plenum*. Among the glossators, it referred to the lordship a vassal might have of land in his long-term possession. See Garnsey, *Thinking about Property*, 199–201.

[218] *App. minor*, 437: "intelligit de iure utendi civili et mundano, cuiusmodi est ius proprium pro quo datur actio in iudicio." Cf. *App. maior*, 378: "quia usus, prout est iuris, est ius proprium utendi aliqua re pro qua datur actio in iudicio habenti tale ius, sicut ex obligatione, ut in Inst. 2.2.2." See also *App. maior*, 325, and *App. mon.*, 759 and 839.

that *ius* and *actio* were two separate concepts, Michael claimed that a *ius* effectively includes the right to protect that *ius* in court.

## 4. *Francis of Marchia*

Francis of Marchia appears to have been quite unaware of juristic thought about *ius*. Indeed, in general, Francis was uninterested in elaborating a theory of law, preferring instead to focus on the 'rights side' of *ius*. This is evident when we realize that Francis passed up the opportunity to discuss almost all of the *capitula* of the first distinctions of the *Decretum*, compared with the how he dealt with the relevant sections of Roman law.[219] In this respect, as we shall see, he serves as a perfect foil to Ockham's much more profound debt to canonistic literature on the nature of *ius*.

### 4.1. Ius *as Law*

Francis naturally divided the types of law in the the three traditional categories, namely divine, natural, and human. Divine law is of course superior to other law, and certain forms of *dominium* derive directly from it.[220] Natural law's relationship with divine law is left unsaid, and hardly discussed in general. As we have seen, though, it was common for people to think that they are in some sense two sides of the same coin; presumably, this holds true for Francis as well. What is more interesting is that Francis seems to have thought that natural law has changed. In a section where he was arguing that the nature of lordship itself had changed with the Fall, he wrote:

> Set ius nature, derelictum ex primevo iure nature, stat cum opposito iuris introducti per iniquitatem, secundum omnem sui speciem et gradum, quia carens omni dominio seu iure per iniquitatem introducto, siue universali siue particulari, siue proprio siue communi, in extrema necessitate constitutus, habet ius nature in rebus proximi sibi neccessariis, cum ab omni lege extrema necessitas sit excepta.[221]

[219] See Table C.2 in Appendix C, particularly D. 1 ff., Inst. 2.4–5, and Dig. 7.1–5.

[220] *Improbatio* 622 (297): "non debent leges ciuiles militare contra legem diuinam set potius e conuerso."

[221] *Improbatio* 258 (153–54): "But the law of nature, left over from the primeval law of nature, exists in opposition to the law introduced by iniquity according to every species and grade of it; for, the one lacking all lordship or right introduced by iniquity, whether universal or particular, whether exclusive or common, [when] established in extreme necessity, has a right of nature to his neighbour's things that are necessary to him, since extreme necessity is exempt from every law." Lambertini, *La povertà pensata*, 215–17, has noted the mutability of

This passage exemplifies well the double nature of *ius* in that *ius naturae* could easily be translated as "law of nature" or, in the objective sense of the word, "right of nature." The use of *lex* at the end of the passage contrasts this unwritten *ius* with positive *lex*.

In terms of the hierarchy of *ius* that Francis envisioned, it seems he thought that the (current) law of nature left over from the primeval law of nature—which existed in the prelapsarian state of innocence—is opposed to all *ius* introduced after the Fall. Francis's point is congruent with the claims of the decretists in the sense that both thought natural law was mutable in part, but clearly his terminology differs from the way the decretists framed the issue. Regardless, for Francis, the law of nature supersedes all postlapsarian law, as the example of extreme necessity dispensing with *omnis lex* demonstrates.

We shall have occasion to examine this relationship again in more detail when we look more closely at his theory of the sources of *dominium*, but for now it is important to note that although Francis alluded to the juristic commonplace that "necessitas legem non habet," he made no argument that connects the theory to the Franciscans' lack of rights, nor defended the idea by reference to its sources in canon law.[222] Within Michaelist circles, he seems to be alone in this.

With regard to positive or civil law, Francis's comments were also few. As far as he was concerned, although the pope had argued otherwise, his various pronouncements about evangelical poverty spoke in the context of civil law. This was particularly true when it came to matters of use.[223] Periodically, Francis accused the pope of "dragging" divine law down to the level of positive law, which suggested to Francis that the pope preferred civil law to divine law.[224] However, although Francis would repeatedly try to show that the pope's comments had to refer to a "civil and worldly" lordship or right of using (despite John's claims to the contrary), he offered very little about the origins or justification of positive law. The only place where he

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natural law sketched here is at odds with what he wrote in his *Sentence Commentary*. See also Lambertini, "Natural Law" 3:1626–31, for a discussion of his pre-*Improbatio* views.

[222] For the references, see the discussion on pp. 305 and 308, below; and cf. Michael's references on p. 108, above.

[223] See p. 195, below.

[224] *Improbatio* 681 (317): "ubique conatur [John] trahere uerba legis diuine et sanctorum patrum ad uerba legis mundane, et non e conuerso, quod non est aliud, secundum ueritatem, quam preferre legem seculi legi Dei et sanctorum: quod est omnino erroneum et immane quia hoc est preferre auctoritatem hominum auctoritati Dei et sanctorum." Cf. *Improbatio* 585 (285).

spoke at any length at all on this topic was when he refuted John's claim that (proprietary) lordship was not introduced by positive law.[225]

### 4.2. Ius *as Right*

Unlike Michael or Ockham, Francis never alluded to the notion that one should not be deprived of one's right without fault or cause. When it came to the rights 'side' of *ius*, His interest remained resolutely tied those that pertained to the problem of poverty. The only rights Francis was concerned with were uses of right, and the *ius utendi* in particular. Two related points stand out in sharp relief: that rights of using and licences of using are fundamentally different, and we know this is the case because a right is defensible in court while a licence is not. We shall examine the nature of a licence and right of using in chapter five, but for now we should consider what is meant by the idea that a right is defensible in court.

Francis's often-repeated premise is that a *ius utendi* intrinsically includes a *ius agendi*. Francis started with John's denial in *Quia vir* that he meant a *civil* right of using. Francis of course insisted that the pope meant a "an exclusive right for which an action is given in court" (*ius proprium pro quo datur actio in iuditio*),[226] and he either did not understand or chose not to understand the pope's claim that a right of using was something other than a right of action. *Ad conditorem*, for Francis, dealt with this very kind of civil *ius utendi*. This right of using was a "litigious and contentious" (*litigiosum et contentiosum*) right from which just acts of using can be separate. For proof Francis quoted at some length from *Quia quorundam*.[227] The pope's problem, Francis explained, was that he was responding to Michael, and Michael *was* speaking about such a litigable right.[228] (The fact that John was contesting Michael's own interpretation of the pope's texts is not discussed.) One must also conclude that *Ad conditorem* meant a civil right of using because of his definition of use, which insisted that the substance of the thing used must be preserved—which is manifestly not an idea taken from *ius divinum*.[229]

Francis's other concern was that the right of using under debate was actually a *ius proprium* not a *ius commune*. Francis instead argued that a *ius proprium*, an exclusive right, can be exclusive to a specific individual or

[225] See the discussion starting on p. 150 below.
[226] *Improbatio* 714 (328); See above, p. 49.
[227] *Improbatio* 722–724 (329–30); *QQM* 255–272 (278–79). Cf. *Improbatio* 737 (333).
[228] *Improbatio* 726–730 (330–32).
[229] *Improbatio* 738–740 (333–34).

exclusive to a specific community.[230] The point will be important when we consider Francis's arguments about the corporate poverty of the Franciscan order.

## 5. *William of Ockham*

In contrast to the other Michaelists, many articles have been written about William's views about *ius*, especially his views on *ius naturale*.[231] These studies, however, tend to focus on his more mature political writings, particularly the *Dialogus*.[232] Far less attention has been paid to how Ockham's position draws on or differs from the contemporary Michaelist tracts.

### 5.1. Ius *as Law*

Even when *ius* means "law," it can mean many different things for Ockham. On the one hand, the *Opus nonaginta dierum* makes reference to the traditional division of divine, natural, and positive (civil or human) law; on the other, there is also a lengthy discussion of the differences between *ius poli* and *ius fori*—based on a distinction made in *Exiit*—about halfway through the text.[233] These two treatments of *ius* are somewhat different from each other. As I hope to show in this section, the best way to think about the difference between the *ius poli* and the *ius fori* is that the second concept refers to forms of positive law, whether they are human or divine positive law, while *ius poli* refers to non-positive, or "moral" law. That is, human law is always positive, natural law is non-positive, and divine law might be either.[234]

Regarding the threefold division current in juristic circles, Ockham gave divine law little attention in the *Opus nonaginta dierum*, though later offhand references suggest he did not find the idea problematic.[235] However,

[230] *Improbatio* 732 (332).

[231] Some studies that focus on Ockham include: Hall, "Ockham and Natural Law," Kilcullen, "Natural Law and Will," Kölmel, "Das Naturrecht," McDonnell, "Theory of Natural Law?" McGrade, "Moral Omnipotence," Offler, "Three Modes," Parisoli, "Ockham e la fonte dei diritti naturali," Tierney, "Natural Law and Canon Law." Many more touch on the topic incidentally in the course of a more comprehensive treatment.

[232] Especially 3.2 *Dial.* 3.6 (263ra–64rb).

[233] See the detailed discussions in Miethke, *Ockhams Weg*, 477–502, and Parisoli, "Il concetto di diritto soggettivo," 128–35.

[234] Kilcullen, "Political Writings," 308, described the *iura poli* as "rights under natural moral law," which begins to get my claim.

[235] E.g., 3.2 *Dial.* 1.29 (246va).

it is quite likely that he felt that divine and natural law overlap to a great degree.[236] Following D. 1 c. 1, Ockham agreed that *fas* properly refers to divine law,[237] but most of the time in the *Opus nonaginta dierum* reference is only made to divine law when he is discussing certain types of "rights," such as licences.[238]

Natural law, as I suggested, is a complicated and ubiquitous concept—or even a set of concepts—in Ockham's writings, and he put it to many uses over the years. In the *Opus nonaginta dierum* one of the most important discussions of natural law occurs during his account of *ius poli*, or law of heaven, for "all natural law pertains to the law of heaven."[239] Ockham's definition sounds rather simple:

> Ius autem poli vocatur aequitas naturalis, quae absque omni ordinatione humana et etiam divina pure positiva est consona rationi rectae, sive sit consona rationi rectae pure naturali, sive sit consona rationi rectae acceptae ex illis, quae sunt nobis divinitus revelata.[240]

Thus, the "law of the heavens" is a natural equity harmonious with right reason, whether this be based on divine revelation or be purely natural. Right reason is a thorny problem in Ockham studies, partly due to the fact that he never formally defined what he meant by the term.[241] Tierney once complained that right reason "in Ockham's polemical works … meant simply his own reason,"[242] but this could be said just as glibly of almost any philosopher and does not get us very far. It would seem that Ockham believed that being consonant with right reason is an objective, normative claim. What we believe to be right is not necessarily or actually right; rather, as Lucan Freppert has argued, it seems as though God's will is the norm that guides right rea-

[236] As circumstantial proof: the goal in 3.2 *Dial.* 3.6 was to explain to the student (1) how divine law could be "extended" to all natural law, and (2) how all natural law could be called divine law.

[237] *OND* 66.42–46 (2:581).

[238] See p. 118, below.

[239] *OND* 65.80–81 (2:575).

[240] *OND* 65.76–79 (2:574): "The law of heaven is called natural equity, which is consonant with right reason (whether it is consonant with purely natural right reason, or it is consonant with right reason taken from those things that are divinely revealed to us) without any human ordination, and even without any purely positive divine ordination." Cf. 92.20–30 (2:669), where natural equity is equated with the state of innocence in the context of *Glos. ord.* ad C. 12 q. 1 c. 2, s.v. "per iniquitatem"; and *Brev.* 2.24.1–28 (4:160–61). Natural equity remained a central concept of Ockham's political writings, a point first studied by Bayley, "Pivotal Concepts."

[241] Clark, "Ockham on Right Reason," 13.

[242] Tierney, *Origins*, 230.

son.[243] His *De connexione virtutum* is of help here. There Ockham described the first grade of virtue in the sense of being the minimum requirements for a virtuous act in the following way:

> quando aliquis vult facere opera iusta conformiter rationi rectae dictanti talia opera esse facienda secundum debitas circumstantias respicientes praecise ipsum opus propter honestatem ipsius operis sicut propter finem, puta intellectus dictat quod tale opus iustum est faciendum tali loco tali tempore propter honestatem ipsius operis vel propter pacem vel aliquid tale, et voluntas elicit actum volendi talia opera conformiter iuxta dictamen intellectus.[244]

As he would say elsewhere, "Rectitudo actus non est aliud quam ipse actus qui debuit elici secundum rectam rationem."[245] Right reason, then, is so called in Ockham's view precisely because it is *right*. The *ius poli* is no less objectively founded. The last condition of the passage just quoted from the *Opus nonaginta dierum* makes it clear that sometimes we are justified in referring to this "law" as divine law, but also that these are not as easily recognized in principle. For example, although it is consistent with right reason taken on the basis of matters of belief (*ex credibilibus*) that preachers may be sustained from the goods of those to whom they preach, this is not something that can be proven through natural reason.[246]

*Ius poli* also covers natural law, the chief principle of which—in the context of the poverty debate—had to do with the oft-repeated case of extreme necessity.[247] In times of extreme necessity, one may take steps to ensure he

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[243] Freppert, *Basis of Morality*, 81–82; cf. Kilcullen, "Natural Law and Will" 872. See in addition to Freppert, Adams, "Ockham's Moral Theory," Adams, "Voluntarist of Naturalist?" and King, "Ockham's Ethical Theory."

[244] *Connex.* 2.116–123 (OTh 8:355): "when someone wishes to do just works in a way conforming to right reason, which dictates that such works ought to be done according to circumstances considering precisely that work for the sake of the integrity of that work just as if for the sake of its end. For example, the intellect dictates that such a just work should be done in such a place at such a time for the sake of the integrity of that work, or for the sake of peace or some other thing, and the will elicits the act of willing such works in a way conforming to a dictate of the intellect." For the *Connex.*, the first place to turn is Wood, *Ockham on the Virtues*, which contains in addition to the text and translation a very useful commentary.

[245] *Quodl.* 3.15.93–94 (OTh 9:261): "The rightness of an act is nothing other than the act itself that ought to be elicited according to right reason." Cf. the discussions in *Sent.* 3.11 (OTh 6:385.10–87.7), and 1 *Dial.* 6.77 (90rb–91ra).

[246] *OND* 65.81–89 (2:575). He added, by way of example, that this parallels the fact that it cannot be proven through natural reason that what preachers actually preach is useful, true, or necessary.

[247] Bayley, "Pivotal Concepts," recognized the importance of this maxim for Ockham's political thought long ago.

or she does not die of, e.g., starvation, "quia necessitas non habet legem."[248] As we shall see, this principle of "natural law" *ius* manifests in the form of a "natural right" *ius*, which is common to all and fundamentally irrenounceable.[249] We should therefore note in passing that Ockham has often been misinterpreted on two points. First, Ockham never tried to maintain that the Minorites had renounced all rights; his point was rather that the friars managed without civil law rights. Second, this natural right is something common to the whole human race, which means it cannot be something that applies to Franciscans *qua* Franciscans (or apostles *qua* apostles). It is thus somewhat outside of the scope of the controversy with the pope, at least as far as the Michaelists were concerned. Athough most readers of Ockham have not failed to notice this, a final point bears repeating: Ockham was very clear that natural law during times of manifest necessity did not establish any positive rights.[250]

*Ius* might also refer to civil law. Positive (or civil or human) law has legitimate force only where it does not contravene natural or divine law. A reference to an early gloss in the *Decretum*, shows that Ockham was aware that *ius ciuile* may be spoken of in many ways.[251] But he specified along with his confreres that the primary meaning, at least for the dispute between John and the Michaelists, is "human law."[252] This stipulation was of course very important to Ockham's argument, for he wanted most of the technical terms of this dispute to be significant only in the context of positive law.

Ockham used the term *ius fori* primarily to designate this body of law, but it also might exist through positive divine law: "ius fori vocatur iustum, quod ex pactione seu ordinatione humana vel divina explicita constituitur."[253]

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[248] *OND* 3.416 (1:322). For discussion, see p. 305, below.

[249] The clearest example of this occurs at *OND* 61.35–43 (2:559), where it is claimed that "*ius utendi naturale* commune est omnibus hominibus, quia ex natura, non aliqua constitutione superveniente, habetur.… [People in extreme necessity] non tamen habent ius utendi [naturale] rebus alienis nisi pro tempore necessitatis extremae: in quo tempore virtute *iuris naturae* omni re praesente, sine qua vita eorum salvari non posset, licite uti possunt" (emphasis added). This point is discussed further on p. 212, below.

[250] Lambertini, "Poverty and Power," 156.

[251] *Glos. ord.* ad D. 1 c. 7, s.v. "Ius naturale"; discussed above, p. 98. Tierney, "Natural Law and Canon Law," 6, has suggested that Ockham's views on positive law were "entirely conventional."

[252] *OND* 91.25–34 (2:666).

[253] *OND* 65.40–41 (2:573–74): "A law of the forum is called 'just' that is established by a pact or human or explicit divine ordination." This is an example of why we cannot simply equate *ius poli* and *ius fori* with natural/divine law and civil law. Although Ockham never gave an example of what a law established by an explicit divine pact is, in 3.1 *Dial.* 2.20.143–146

Later there is the further specification that while a *ius poli* is a power consistent with (*potestas conformis*) right reason without a pact, *ius fori* is a power derived from a pact with no essential connection to right reason.[254] For example, everyone who possesses well, does so at least by *ius fori* or by *ius poli*; in the latter case, such a person always possesses well, but in the former, not everyone does.[255] That is, the actual state of affairs, such as the existence of a law, may be a necessary criterion, but it is not a sufficient one, for judging whether it is just or valid. However, once such a law has been established, although it may not be entirely equitable, provided it does not violate the positive or negative directives of natural and divine *ius*, it retains legitimate force and cannot be violated at will.[256] That is, to recycle an earlier example, once it has been established which side of the street I am to drive on, it is no longer up to me to choose which side of the street I can drive on.[257]

### 5.2. Ius *as right*

Historically, there has been far more interest in the way Ockham used *ius* in a way in which we would translate as right.[258] Ockham never gave a generic definition of *ius*-as-right. Perhaps the closest we come is the claim that, again based on canon law, "nullus autem sine culpa et absque causa rationabili debet suo iure privari."[259] A right was something which was to be

(8:208) the Master explains: "Sed pro necessitate licet facere contra preceptum divinum, eciam expressum, in hiis que non sunt de se mala, sed solum sunt mala quia prohibita. Ergo eciam pro utilitate communi licet facere contra preceptum dei et ordinacionem Christi." Kölmel, "Das Naturrecht," 83, has suggested that "das göttlich positive Gesetz bezieht sich auf die 'mala quia prohibita.'" A similar sentiment can be found in *Quodl.* 2.14.18–29 (OTh 9:177); see Miethke, "Ockham und die Kanonisten," 395–96, for comment.

[254] *OND* 65.274–276 (2:579): "ius fori est potestas ex pactione aliquando conformi rationi rectae, et aliquando discordanti."

[255] *OND* 65.273–279 (2:579).

[256] *OND* 65.46–48 (2:574).

[257] One might compare Aquinas's views as discussed in McInerny, "Ethics," 209–10.

[258] In large measure, this is due to Villey, *La formation*, 261, who thought that Ockham initiated a semantic revolution, a "moment copernicien de l'histoire de la science du droit."

[259] *OND* 61.55–59 (2:559–60), citing *Glos. ord.* ad X 1.2.2, s.v. "culpa caret," *Glos. ord.* ad X 4.13.11, s.v. "sine sua," and *Glos. ord.* ad D. 22 c. 6, s.v. "prius quam": "no one ought to be deprived of his right without fault and without reasonable cause." This is actually a highly significant feature of Ockham's general 'political' outlook, which Knysh, *Political Ockhamism*, 106, has called a "fundamental principle of Ockham's historical juridism." One can find the basic idea again and again in his polemical writings: *AP* 5.20–22 (1:243), 57–59 (1:244); *Brev.* 2.3.51–54 (4:115), 2.5.104–107 (4:119–20), 2.16.13–17 (4:143), 4.4.11–14 (4:201); 1 *Dial.* 7.67 (160va); 3.1 *Dial.* 1.16.29–35 (8:156); 3.2 *Dial.* 1.23 (242ra–b); *IPP* 6.11–18 (4:291), 9.29–31 (4:300); *OQ*

respected, not modified at the whim of another, regardless of their personal or political relationship, regardless of which law it was based on. Ockham was a staunch defender of individual rights; it was an idea to which he would return in later treatises, convinced it was a necessary byproduct of the law of evangelical liberty ushered in by the New Law.[260] But, as noted, this feature of his thought had deep and strong canonistic roots.[261]

There is a danger of reading too much into this claim. As much as rights were to be respected, they did not, in Ockham's opinion, 'trump' all other considerations, particularly as they pertain to matters of general welfare or the *bonum commune*.[262] That was precisely the point of the stipulation 'not without fault or reasonable cause.' Manifest necessity was the obvious example of cause in this case; later the same principle would apply when it came to determining if a pope or emperor was overstepping his prerogatives.[263]

Despite Ockham's scrupulous regard for one's rights, most of them, grounded as they are in human positive law (as established in the *ius fori*), are dispensable. This makes sense if civil law derives its initial validity—provided of course no norms of divine or natural law are violated—from a pact of some sort. However, not all rights can be renounced. Rights deriving from natural law, so-called natural rights are inherently irrenounceable:

> abdicatio iuris naturalis in usu rei non est sancta, cum illi iuri nemini liceat renuntiare; qui enim tali iuri renuntiaret, non posset in articulo necessitatis extremae de re aliena sine licentia alterius conservare vitam suam: quod falsum est.[264]

Note how different this is from Michael's position. People have a natural right rather than a licence to the use of a thing in times of necessity; and

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1.7.52–63 (1:35), 1.11.16–18 (1:45), 2.2.17–22 (1:70), and 7.4.31–35 (1:171). See also *Impug.* §§ 12, 18, 21 (248, 250–51).

[260] Cf., e.g., *Brev.* 2.3.42–64 (4:114–15); cf. Tierney, *Idea of Natural Rights*, 194. See also Lewis, "Natural Law and Expediency," 156.

[261] Tierney, "Natural Law and Canon Law," 8, and *Idea of Natural Rights*, 202; cf. McGovern, "Private Property," 144 and 147.

[262] The terminology comes from Dworkin, "Rights as Trumps," originally by way of Griffin, *On Human Rights*, 20–21 and Wenar, "Rights," § 5.1.

[263] Cf. McGrade, *Political Thought*, 216–25.

[264] *OND* 62.71–74 (2:564–65): "the abdication of a natural right to the use of a thing is not holy since no one is allowed to renounce that right. For he who would renounce such a right would not be able to preserve his own life in a critical moment of extreme necessity from someone else's things without a licence of another—which is false." Cf. 61.119–122 (2:561), 61.140–145 (2:562), 65.197–200 (2:577–78), and 65.243 (2:579). However, as Kölmel, "Das Naturrecht," 45–46, has noted, natural rights may be limited or restricted; cf. Kilcullen, "Political Writings," 308.

this right, moreover, supersedes any granting or withholding of a licence on the part of the owner; here the language of 'trump' seems more appropriate. The end result may be the same, but the categories are quite different.

In modern discussions, several types of rights are usually distinguished; and though Ockham's terminology is far from modern, he also argued for the existence of several different types of rights insofar as they related to discussions of property. One of the most important categories was the *ius utendi*, which Nicholas III had added in *Exiit* to Bonaventure's other four *consideranda* concerning temporal things.[265] In terms of positive rights, let it suffice for now to mention only the two most important: *ius utendi* and *usus iuris*, which we shall discuss in chapter five.

[265] Cf. *Ap. paup.* 11.5 (BOO 8:312a), and *Exiit*, 2:1113.

CHAPTER FOUR

# THE NATURE OF DOMINIUM

In writings on property, *dominium* primarily describes a relationship, either between people or between people and things.[1] Richard Fitzralph (*ca.* 1300–1360), a younger contemporary of Ockham, though certainly not an ally of the Franciscans, made explicit what the Michaelists only implied: namely, that the lordship exercised by God was not the same as that exercised by mankind.[2]

They were also agreed upon another point insofar as they tended to use *proprietas* and *dominium* together as approximate synonyms, at least when writing about poverty and property. Broadly speaking, this had been the case among Franciscans since the time of Bonaventure, whose very first defense of mendicant poverty stressed the separation of *usus* from both *dominium* and *proprietas*: use was necessary for human life, but lordship and ownership were not.[3] Later on in the better known *Apologia pauperum*, he made the point that everything given to the friars passed into the *ius*, *dominium*, and *proprietas* of the Roman Church.[4] Bonaventure was only repeating what Innocent IV had declared in *Ordinem vestrum*, but it does suggest that Bonaventure thought the friars could live without any *dominium*.

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[1] A brief account of the evolution of the general meaning of *dominium* from its early Patristic and Aristotelian blending to the full-blown medieval concept may be found in Oakley, *Political Thought of Pierre d'Ailly*, 66–75; for the legal background to the term, see especially Coleman, "Property and Poverty," 611–20.

[2] *De pauperie Salvatoris* 1.1–2, in Poole, *Wyclif de dominio divino*, 278–80. On this see Lahey, *Philosophy and Politics*, 49–63, and Varkemaa, *Conrad Summenhart's Theory*, 37–44.

[3] Bonaventure, *De perfectione evangelica* 2.1 ad 3 (BOO 5:131b): "Nam usus temporalium necessarius est vitae humanae, qui tamen haberi potest absque dominio et proprietate, sicut patet in pauperibus, qui nihil proprietatis habent." The concern about *dominium* also manifested itself in the *Rule* Commentary tradition, even before Bonaventure disputed his early questions; see, e.g., *Expositio Hugonis* 4 (128.9–27). The earlier so-called *Expositio quatuor magistrorum* evinces a greater interest in *proprietas*; see Oliger, *Expositio quatuor magistrorum*, 143, 150–54.

[4] *Ap. paup.* 11.8 (BOO 8:313a): "sic quidquid datur congregationi Minorum Fratrum in ius, dominium et proprietatem summi Pontificis et Romanae Ecclesiae transit; praecipue cum ipsi Fratres ius seu proprietatem rei alicuius sibi acquirere nulla ratione intendant." Noted

The polemicists of the fourteenth century tended to treat these terms in the same way. Hervaeus Natalis boldly proclaimed in his tract on the poverty of Christ and the apostles that *dominium*, *ius*, and *proprietas* all signified the same thing.[5] And Bonagratia's tract on the same topic describes by reference to the Digest a key meaning of "having something" as "to obtain something by the right of lordship, quasi-lordship or ownership."[6]

Fourteenth-century polemicists treated *dominium* in a way that owed something to the Roman law tradition; however, it is important to realize that it also differs from that tradition in some profound ways. On one point everyone was agreed: *dominium* was a *ius*, if of a special kind.[7] The most important and obvious difference, however, is that Roman jurists treated *dominium* as an "absolute" right. As Peter Birks described this point, *dominium* was not absolute in the sense of being an absolute title, but that the concept itself was absolute. That is, the *dominus rei* did not have complete and inviolable immunity from interference in the goods he owned, simply that one could not have a better claim to ownership than the one afforded by the label *dominium*.[8] Although in general the "law required scrupulous regard for property rights," various restrictions did exist in the way an owner could treat his property. He might need, for example, to bow to the needs of the state.[9] In general, to have lordship of a thing meant that one had the rights to the use, fruits, and disposal,[10] although in certain cases it might in

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by Brett, *Liberty, Right and Nature*, 18.

[5] Hervaeus Natalis, *De paup.*, 235–36: "Quantum ad primum, sciendum quod ista nomina, 'dominium,' 'ius,' et 'proprietas,' idem dicunt in re. Nichil enim aliud dicunt quam habere potestatem in aliqua re per quam possit licite re aliqua uti vel rem aliquam alienare, et hoc vel per donationem vel per venditionem vel per quemcumque alium modum." On Natalis and this passage in particular, see now Varkemaa, "Individual Right as Power," 110–16.

[6] *De paup.*, 324: "Primo modo iure dominii vel quasi dominii seu proprietatis aliquid obtinere, Dig. 50.16.188; Dig. 45.1.38.9." This passage is put into its proper context on p. 177, below. Michael of Cesena similarly insisted that when John wrote in *CIN* that it was heretical to say that Christ and the apostles had nothing, he meant that "non habuerint aliqua iure proprietatis"; see *App. maior*, 327. The term *quasi dominium* deserves more attention than can be given here. Bartolus of Sassoferrato (d. 1357) used it in his commentary to the *Digest*; see Coing, "Zur Eigentumslehre," 365–66. Feenstra, "*Dominium* and *ius in re aliena*," 113 and 118–19, briefly touches on the history of the term.

[7] Cf. Garnsey, *Thinking about Property*, 184–90.

[8] Birks, "Concept of *Dominium*," 19. See Canning, "Italian Juristic Thought," for a discussion of medieval jurists' views on the need for the *princeps* to respect people's property rights (unless there is cause).

[9] Birks, "Concept of *Dominium*," 12–13 and 16–17.

[10] See above, p. 55.

fact amount to a *ius nudum*, that is a bare right "with no practical content."[11] Naturally, the holder of these rights must also have possession of the thing against which he holds these rights. But *possessio* is not *dominium* in Roman law, though it could mature into *dominium* with time.[12]

This is not, generally speaking, how the Michaelists treated the concept of *dominium*. It is not that they disagreed with Roman law ideas about the term, just that they approached it from a rather wider perspective. Let us anticipate a bit and take Ockham as an example.

For his part, Ockham followed in this general tradition. One who has *proprietas* of a thing has *dominium* of it.[13] For Ockham the overlap between *dominium* and *proprietas* is significant:

> Unde proprietas, secundum quod hoc nomine scientiae legales utuntur, licet idem quod dominium, accipiendo "dominium" quod competit ex iure positivo, non tamen significat idem quod dominium, accipiendo "dominium" secundum alias significationes in principio istius opusculi.[14]

In short, *dominium* simply has more meanings than *proprietas*.[15] In Ockham's formulation, in legal discourse, it is best to think of *proprietas* as a type of lordship. Specifically, he argued that ownership was more or less synonymous with *dominium proprium*,[16] for both terms indicate a level of exclusivity:

> sciendum quod sicut omne, quod dicitur proprium, convenit alicui vel aliquibus, et non alii vel aliis, sic est etiam de proprietate, quod ideo "proprietas," quia convenit alicui vel aliquibus, et non alii vel aliis. Dominium igitur, quod vocatur "proprietas," aut [1] ideo dicitur "proprietas," quia convenit alicui homini vel aliquibus hominibus, et non alii homini vel aliis hominibus, aut [2]

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[11] Coleman, "Property and Poverty," 612.

[12] Dig. 41.2.12.1: "Nihil commune habet proprietas cum possessione: et ideo non denegatur ei 'interdictum uti possidetis,' qui coepit rem vindicare: non enim videtur possessioni renuntiasse, qui rem vindicavit." An *interdictum uti possidetis* is an order directed to both parties of a lawsuit that the actual possessor may not be be dispossessed of the immovable at issue; see Berger, "Encyclopedic Dictionary," s.v. "Interdictum uti possidetis" (512). See further the discussion in Miller, "Property," 49–65.

[13] *OND* 2.356–357 (1:307): "dicunt isti impugnatores quod qui habet proprietatem rei, habet dominium rei."

[14] *OND* 14.259–263 (2:436): "Hence, according to how the legal sciences use this word, although ownership is the same as lordship when taking 'lordship' as far as is relevant in positive law, nevertheless it does not mean the same thing as lordship when taking 'lordship' according to other meanings [given] at the start of this work" (cf. 2.434–441 [1:309]).

[15] *OND* 14.269–271 (2:436–37). See 2.262–292 (1:304–05), for non-legal uses of *dominium*, which can have significantly different meanings; cf. 26.81–85 (2:485).

[16] Cf. *OND* 88.257 (2:660).

> dicitur "proprietas," quia convenit homini vel hominibus, et nulli alteri vel aliis extra genus humanum. Si detur primum, habetur intentum quod dominium, de quo loquitur appellans, est proprium uni personae singulari vel alicui collegio speciali. Secundum dici non potest; quia nullius rei habet dominium homo, quin et eiusdem rei habeat aliquis extra genus humanum dominium.[17]

As the above quotation makes clear, *proprietas*, like *dominium*, can be held individually or be common to a group. More importantly, this kind of ownership comes in the same two types of lordship mentioned above: either it allows for the free ordering of the thing (e.g., selling, giving, donating, bequeathing, alienating, using, consuming), or the *temporalia* were conceeded to the individual or group for only certain uses or ways of managing them. Laymen typically have the first type of ownership, while clerics and other religious (and the early Christian community) are limited to the second.[18] Conceptually this restricted ownership seems identical to Michael's and Bonagratia's use of *quasi dominium uel proprietas*, which I have already referred to as restricted ownership.[19]

But let that suffice to show that these terms are closely related enough that in speaking about *dominium* and its connection to *ius* and *usus*, we can safely expect that *proprietas* will have a similar relationship.

### 1. *Bonagratia of Bergamo*

Bonagratia also paired *dominium* and *proprietas*.[20] They were, presumably, two sides of the same coin. And, as just mentioned, they were *iura*. Thus when we say someone has something by right of lordship or quasi-lordship, this means that the thing is counted among an individual's (or a corpora-

[17] *OND* 26.38–49 (2:484): "It must be known that, just as everything that is called 'exclusive,' belongs to someone or some people, and not to another or others, so it is concerning ownership, which is called 'ownership' for the reason that it belongs to someone or some people, and not to another or others. Lordship, therefore, which is called ownership is called ownership for the reason [1] that it belongs to some man or men, and not to another man or men, or [2] it is called ownership because it belongs to a man or men, and no other or others outside of the human race. If the first is given, the intention is upheld: that the lordship of which the appellant speaks is exclusive to one singular person or some particular college. The second cannot be said because a human has no lordship of a thing except that someone outside the human race have lordship of that same thing." God serves as the obvious counter-example in the second case.

[18] *OND* 4.545–564 (1:342–43).

[19] On restricted ownership, see p. 109; cf. pp. 166, and 172 below.

[20] In fact, the *App. ACC*, does not deal much with *dominium*, presumably because it was a response to *Ad conditorem*[1] and that bull was concerned more with use than lordship.

tion's) things. And we say this *because* (*cum*) one has a legal *exceptio* while he possesses the thing, or an *actio* to recover it if he loses it,[21] which he described elsewhere as having in a *dominative* or *possessive* way.[22] It should therefore be clear once more that a defining characteristic of a *ius* for Bonagratia is that the possessor of a *ius* has a legal claim in court.[23]

This is manifestly not the situation of many ecclesiastical possessions. Prelates have management (*administratio*) or stewardship (*dispensatio*) of ecclesiastical things, and they should be considered a steward or executor when it comes to distributing goods to the poor. Strictly speaking, prelates cannot even be said "to possess" beyond the general sense of factual detention.[24] In his response to *Ad conditorem* Bonagratia clarified his position on the question of ecclesiastical ownership. As a series of canonistic references and glosses make clear, the Church has the *ius retentionis*, or *dominium*, of ecclesiastical things. Both Innocent IV and Hostiensis (d. 1271), moreover, explain that Christ "has lordship and possession of the Church's things": what men offer to the Church are in fact offerings to God.[25] Although this is never described as divine lordship, he quoted with approval C. 16 q. 3 c. 6, which uses *aeternum dominium*, and it is clear that he was thinking along these lines.

But this sort of lordship was not at issue. The Franciscans and the pope were actually dealing with normal civil lordship, what later authors sometimes referred to as *dominium humanum*. This sort of lordship did not exist before sin entered the world. There was no "mine" or "yours" before sin, although there was then a use common to humankind.[26] That is, humans lived in the state of innocence "without distinct lordships" (*sine dominiis distinctis*), a feature Christ would reintroduce later on.[27] In the state of

[21] *De paup.*, 324, citing Dig. 41.1.52: "Rem in bonis nostris habere intellegimur, quotiens possidentes exceptionem aut amittentes ad reciperandam eam actionem habemus." The *exceptio* was a legal defense which rendered the plaintiff's claim invalid. See the account in Inst. 4.13, and Berger, "Encyclopedic Dictionary," s.v. "exceptio" (458), for further references.

[22] *De paup.*, 500.

[23] Needless to say, this was probably not the classical Roman law understanding of the idea. Dig. 41.1.52 does refer to ownership in a broad sense, but not necessarily or exclusively to true *dominium* (i.e., *dominium ex iure Quiritium*): see, e.g., Ankum and Pool, "*Rem in bonis meis*," 9 and 32.

[24] *De paup.*, 325. For *possessio* in its legal sense, see below, p. 128.

[25] *App. ACC*, 103–04. Cf. Innocent IV, *Comm.* ad X 2.12.4, n. 3 (212ra–b); Hostiensis, *Comm.* ad X 2.12.3(4), n. 4 (42vb). On these two canonists, see Pennington, "Henricus de Segusio," and "Innocent IV, Pope."

[26] *De paup.*, 506–07.

[27] *De paup.*, 496–97. See Luscombe, "State of Nature," for a survey of medieval views on the

nature God gave two precepts—one positive, the other negative—at the moment of Adam's creation. The first was that he could eat from any tree in paradise; the second was that he could not eat from the tree of the knowledge of good and evil (Gen. 2:16–17). What this showed, Bonagratia argued, was that *usus* fell under a divine precept, not that there was any *dominium*. The pronouns "mine" and "yours" were introduced rather "ex iniquitate et cupiditate gentium et per humanum ius."[28] Since ownership, possession, and lordship exist by human law, much like usufruct and the right of using exist by civil law, an individual may chose to renounce and abdicate these rights completely—just as Esau did the *ius primogeniturae* (cf. Gen. 25:33).[29]

Christ *qua* man and the apostles (after they assumed the state of perfection) were neither lords nor property-holders; what they held, they held as stewards and managers,[30] which means that they exercised only restricted ownership in the name of the greater Christian community. For the apostles' part they abdicated lordship by a vow,[31] and because negative vows always remain in force, the apostles were at no time even capable of lordship or ownership without committing a mortal sin.[32] If Christ or the apostles had a purse, it was thus held only with respect to a stewardship, management, or procuratorship.[33] The lesson we should take from the purse is that the "for-

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state of nature and its importance for medieval political thought. Geltner, "Eden Regained," is an interesting contribution to studies of the Michaelist position, but unreliable on a number of points; cf. Lambertini, "Fragments," 192 n. 30.

[28] *De paup.*, 504: "due to the iniquity and cupidity of the nations, and through human law."

[29] *De paup.*, 503: "Proprietates vero et possessiones et dominia rerum sunt a iure humano, D. 8 c. 1; usufructus etiam et ius utendi est a iure civili, in Inst. 2.2, per totum. Certum est autem quod omni iuri privato, quod alicui competat ex humano iure, potest quis renuntiare et illud a se penitus abdicare; unde Esau ex quo semel renuntiaverat iuri primogeniture, ad illud redire nunquam potuit, C. 8 q. 1 c. 8, Dig. 21.1.14.9, cum similibus." There seems to be some overlap between *ius ciuile* and *ius humanum*, though it is possible that civil law is a more localized form of human law, but it appears as though *ius priuatum* should be translated as "private right" (equivalent to "exclusive right"). Rufinus may add some clarity here; see *Summa decretorum* ad D. 1 c. 8, s.v. "Ius civile" (10–11). Cf. *Glos. ord.* ad D. 1 c. 8 (Casus), quoted on p. 98 n. 162 above.

[30] *De paup.*, 487.

[31] *De paup.*, 333.

[32] *De paup.*, 489; nor did they ever seek lordship (488).

[33] *Procuratio* is related to *procurator*, who was an appointed agent. Dig. 3.3.1 pr.: "Procurator est qui aliena negotia mandatu domini administrat." Significantly, Inst. 2.9.5 allows that a procurator can gain possession and even lordship for the person he represents (even if he be unaware of what is taking place): "et hoc est quod dicitur, per extraneam personam nihil adquiri posse: excepto eo quod per liberam personam, veluti per procuratorem, placet non solum scientibus, sed etiam ignorantibus vobis adquiri possessionem secundum divi Severi

ma … ecclesiastice pecunie institut⟨a⟩ in loculis," as Prosper and Augustine both explained.[34]

Bonagratia also argued that we could consider the *loculi* in light of the condescension theory. He did not deny that Christ physically carried, handled, and managed "what was put in the purse," but he explained that when Christ did so, he did in order to condescend to the weak; he did not do so because he wished to appropriate the contents of the purse for himself or the college of the apostles.[35]

Bonagratia's two short tracts outlined some of the basic views about *dominium* and *proprietas* that would characterize the other Michaelist writings. They are, briefly, that the controversy between the Franciscans and the pope was not about divine lordship or about Christ *qua* God, but about the lordship introduced through civil law after the Fall. This sort of lordship did not exist in the state of nature, nor among Christ and the apostles. Even a prelate's control over *res ecclesiasticae* cannot be considered lordship of this kind. Clearly, Bonagratia's account leaves a few too many questions about *dominium* unanswered at this point to be fully satisfactory. The picture would be fleshed out a bit, however, by his confreres.

## 2. *Michael of Cesena*

Michael recognized that *dominium* could be used in many different contexts. However, the primary meaning, he thought, was pretty much universal. The term is quite obviously intimately connected with *dominus*, and one was called a lord from the act of dominating: "'dominus' a dominando dicitur."[36] This tends to be the opposite of the modern view of the relationship between *dominium* and *dominus*, which progresses from *domus* through *dominus* to *dominium*.[37]

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constitutionem et per hanc possessionem etiam dominium, si dominus fuit qui tradidit, vel per usucapionem aut longi temporis praescriptionem, si dominus non sit."

[34] *De paup.*, 490, citing C. 23 q. 7 c. 2 (instead of Prosper, it should be Julianus Pomerius). Not, of course, that this amounted to actual ecclesiastical lordship in the positive law sense. I read the variant *instituta* rather than *institute*, though the difference in meaning is not that great.

[35] *De paup.*, 488–90; not that he had a purse *regulariter* (497). Bonaventure first raised the condescension point in *De perfectione evangelica* 2.1 (BOO 5:131b); cf. *Ap.paup.* 7.36 (BOO 8:284b). On this issue, see Damiata, *Povertà e potere* 1:141–42, and the brief comments in Horst, *Dominicans and the Pope*, 25–26, Lambert, *Franciscan Poverty*, 136, and Leff, *Heresy*, 90–92.

[36] *App. mon.*, 654. John had said much the same thing; see *QVR*, 570.

[37] See, e.g., the respective entries in Lewis and Short, *Latin Dictionary*, 610–11. Michael's

Conceptually, Michael located both *dominium* and *proprietas* under *possessio* in the sense that possession often entailed lordship and ownership.[38] Here he was clearly using *possessio* in a technical sense. Elsewhere he argued that one needed to have the will to possess in order to possess in a proprietary way:

> regulariter nullus potest proprietatem, dominium, immo nec possessionem in rebus aliquibus usu consumptibilibus vel non consumptibilibus adquirere nisi habeat voluntatem sive animum adquirendi sive habendi, Dig. 41.2.3; et Dig. 41.2.8.[39]

The references are germane. Two opinions contrast the *naturalis possessio* of Dig. 41.2.3 with the clearly legal possession meant in the other laws,[40] while the other passage states Michael's point succinctly: "Quemadmodum nulla possessio adquiri nisi animo et corpore potest, ita nulla amittitur, nisi in qua utrumque in contrarium actum est."[41] This is why we say, Michael continued,

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views were current, however: see *QVR*, 570 and 591, where John cited Ps.-Dionysius to this effect; cf. *De divinis nominibus* 12.1–2, in Migne, *Patrologia graeca* 3:970. See also Willoweit, "*Dominium* und *Proprietas*," for a general discussion.

[38] *App. mon.*, 672 [in the context of Lc. 14:33]: "Ex quibus verbis Christi patet quod volens ipsum perfecte sequi, debet renuntiare proprietati et dominio omnium rerum temporalium, cum dicat 'omnibus quae possidet,' et sub nomine possessionis proprietas et dominium contineatur, ut notatur C. 16 q. 2 c. 9; et Dig. 50.16.78." As usual, Michael was trying to demonstrate that both canon and civil law were on his side; however, C. 16 q. 2 c. 9 has nothing explicitly to do with *dominium* or *proprietas*: "Possessio territorii conuentum non adimit ideoque nouae basilicae, que conditae fuerint, ad eum proculdubio pertinebunt episcopum, cuius conuentus esse constiterit." Dig. 50.16.78 is more to the point, but the use of "interdum" seems to limit its supposedly universal applicability: "Interdum proprietatem quoque verbum 'possessionis' significat: sicut in eo, qui possessiones suas legasset, responsum est."

[39] *App. maior*, 251: "no one can regularly acquire ownership, lordship, not even possession of some things consumable by use, or not consumable, if he does not have the will or spirit of acquiring or having: Dig. 41.2.3 and Dig. 41.2.8." Cf. *App. mon.*, 725. Brett, *Liberty, Right and Nature*, 13–20, has stressed the importance of will and *dominium* in the context of the thirteenth-century poverty debates. One example of this is Duns Scotus, *Ordinatio* 4, d. 15 q. 2, n. 2, in Wolter, *Scotus: Political and Economic Philosophy*, 40: "Ex hoc patet quid requiritur ad iustam donationem, quia liberalis traditio ex parte donantis, et voluntas recipiendi ex parte illius cui fit donatio…." I think it is fair to add that willing was also a conspicuous feature of Roman law views on *dominium*. It was often phrased in terms of intention, but the point is the same. See, e.g., Dig. 41.2.3.1: "Et apiscimur possessionem corpore et animo, neque per se animo aut per se corpore." Further discussion in Berger, "Encyclopedic Dictionary," s.v. "possessio" (637), and Miller, "Property," 53–55, 58–60. Cf. *App. mon.*, 843–44.

[40] Dig. 41.2.3.3 and 41.2.3.13; cf. 41.2.1.1.

[41] Dig. 41.2.8: "Just as no possession can be acquired except by soul and body, so none is lost except where both things occur to the contrary."

quoting from the *Digest*, the insane or a ward without his guardian are unable to possess in this sense even if they happen to touch the things in question.[42]

The importance of willing for the aquisition of of lordship is hard to overstate.[43] The same criterion applies when it comes to "giving." John had held that *dare* meant to make something the receiver's.[44] Michael disagreed of course. He recognized the Roman law basis of the claim,[45] but denied its universal applicability. When Jesus gave his disciples the loaves of bread and fish in Matthew 14.19, he did not give them ownership or lordship, for had he done so, they would have been able to decide whether or not to give them to the crowd according to their own wishes, which the *Code* of Justinian describes as a key feature of ownership.[46]

### 2.1. *Dominium diuinum*

The pope made a big deal about the importance of divine lordship in his post-Bonagratia bulls. The Michaelists, however, did not find his views particularly accurate or important. Ockham summed up the point quite well in his *Breviloquium*. Essentially there are different kinds of *dominium* so it

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[42] *App. maior*, 251–52. Note that the editors should have marked this passage as quoted from Dig. 41.2.1.3 thus: "Unde dicitur quod 'furiosus et pupillus sine tutoris auctoritate non possunt incipere possidere,' id est possessionem adquirere, 'quia affectionem tenendi non habent, licet ⟨maxime⟩ corpore suo rem contingant, sicuti ⟨si⟩ quis dormienti aliquid in manu ponat,' Dig. 41.2.1.3." (The words in the angle brackets are found in the *Digest*; the first set of angle brackets are my own; the second the editors'.) See *App. mon.*, 843–44, for a fuller list of legal references.

[43] Cf. the discussion of Enrico del Carretto's *De statu dispensativo Christi* in Emili, "Tra *voluntas* e *necessitas*," esp. 158–87.

[44] See *QVR*, 564, concerning the division of goods described in Acts 4:35: "Ergo si data fuerunt eis, et ab illo, scilicet Deo, qui dare potuit, dicendum est quod domini sunt effecti, quia dare est accipientis facere." Cf. *QVR*, 561, 605.

[45] Dig. 41.1.20 pr.: "Traditio nihil amplius transferre debet vel potest ad eum qui accipit, quam est apud eum qui tradit. Si igitur quis dominium in fundo habuit, id tradendo transfert, si non habuit, ad eum qui accipit nihil transfert."

[46] *App. mon.*, 810: "Nam licet dare aliquando sit accipientis facere quantum ad proprietatem et dominium cum res datur ab eo qui dare potest et illi qui recipere potest, sicut patet Dig. 41.1.20, tamen non est hoc semper verum, quod dare sit accipientis facere quoad proprietatem et dominium, sicut probatur Matthaei 14.19, ubi dicitur: Iesus, *acceptis quinque panibus et duobus piscibus, benedixit et fregit et dedit discipulis suis, discipuli autem dederunt turbis.* Manifestum est autem quod Christus per dationem illam non transtulit proprietatem et dominium illorum panum et piscium in discipulos suos; tunc enim fuisset in potestate eorum ipsos dare turbis vel non dare et de ipsis ad suam voluntatem ordinare, quia in re propria quilibet est legitimus moderator et arbiter, Cod. 4.35.21." Cf. *App. mon.*, 757–58; much the same can be said of "dividere": *App. mon.*, 811. See also p. 135 n. 70, below.

is important to delineate carefully which one is meant in the debate. So, regarding John's stress on the significance of divine lordship, a Michaelist could respond thus:

> Et domini[or]um rerum temporalium quoddam est divinum, de quo non est dicendum ad praesens; quoddam vero est humanum, et illud est duplex: commune toti generi humano, et proprium.… [Dei] erant et sunt omnia tam iure creationis quam iure conservationis, sine cuius manutenentia omnia in nichilum v[er]terentur.[47]

The Michaelists were not particularly concerned with debating the nature of divine lordship, but neither were they deniers of its existence or importance. Of course, no one seriously doubted God's divine lordship over all things: Christ showed that he was the "true and natural lord of all things," just as, as we have seen, he is also the very source of all law.[48] The question was never about whether Christ *qua* God possessed any lordship.[49]

The pope had insisted strongly on the temporal *dominium* of Christ.[50] But from a Michaelist perspective this was untrue: Christ did not exercise temporal lordship—that is, political mastery in the sphere of positive law—but divine lordship, which is grounded in divine law. Of course this is not to say that he could not have exercised such lordship had he wanted to. By his infinite power, freed *ab omni lege et iure*, he could act above and against law if he chose to do so. And he could do this without any injustice.[51] It seems it would be a small matter for him to exercise any type of lordship he desired.

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[47] *Brev.* 3.7.3–6, 36–37 (4:178, 179): "And a certain lordship of temporal things is divine, about which one need not speak of at present; on the other hand, there is a certain human one, and that one is twofold: common to the whole human race, and exclusive.… All things were and are God's, both by right of creation and by right of conservation—without whose maintenance, all things would turn to nothing." Offler emended the text so, but I would omit the first of them. Boehner, "Ockham's Political Ideas," 473–75, as Offler noted, contextualized this chapter in terms of other, earlier Franciscan writings.

[48] *App. maior*, 355; see p. 103 n. 187, above for the description of Christ as the source of law. Cf. Tierney, "Public Expediency," 168: no one doubted that all "licit dominion came ultimately from God." But in this sense at least, the Michaelists were far removed from the concerns of Giles of Rome and the idea of *dominium cum iustitia*, which could only be held, *de iure*, through the Church: see his *De ecclesiastica potestate* 2.8, in Dyson, *Giles of Rome's* On Ecclesiastical Power, 140–52.

[49] *App. maior*, 317: "Nec de habere de iure divino quaestio umquam fuit. Nullus enim umquam quaestionem fecit quin omnia sint in Dei dominio, non solum terrena sed etiam caelum et terra et omnia quae caeli ambitu continentur."

[50] Cf. Brunner, "Pope John XXII," 185.

[51] *App. maior*, 404; *App. mon.*, 828.

There are advantages and disadvantages to the position Michael adopted here. On the one hand, his insistence that Christ, *in quantum homo viator*, did not exercise temporal lordship (over all of creation) made it easier to argue that the Church had no control over the temporal affairs of kingdoms, whether Christian or not. Non-Christian kingdoms did and could exist legitimately and the Church could not meddle unless manifest need so required.[52] Although earlier canonists, notably Innocent IV and Hostiensis, had said much the same thing,[53] the advantage of this position to the Michaelist cause is obvious, for it meant that the emperor whose protection they enjoyed at that moment was an autonomous and legitimate source of authority, not subject, *de iure*, in temporal matters to the decrees of the pope.

One strange consequence of this insistence on the difference between divine lordship and other forms is that it causes problems for one of the key arguments on the separability of use from lordship. Michael argued, as did his confreres, that one easy way to see how use of fact must be separate from lordship was to consider tithes. God obviously has the lordship of these tithes, just as his ministers are clearly the ones who use them.[54] Presumably, lordship in this case must be divine. But since this is true for all things, it is hard to see why this should be considered a pointed example for this issue.[55] But this is a small matter; the point here was simply that the nature of divine lordship was not really near the root of the Michaelist-John poverty controversy. That was rather a matter of *dominium mundanum et civile*.

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[52] *App. mon.*, 666–67. This position foreshadows Ockham's own views: *Brev.* 3.4–6 (4:172–78), and 4.10 (4:212–15); *OQ* 1.10.55–145 (1:42–45), and 4.3.43–60 (1:126–27); *CB* 6.5 (3:277.29–279.26); *AP* 2.172–197 (1:235); 3.2 *Dial.* 1.25 (243rb–44va). Brief discussion in McGrade, *Political Thought*, 98 and 101–02. See also Melloni, "Ockham's Critique."

[53] See Miethke, "*Dominium*, *ius* und *lex*," 251–52 and 255–56, for the opinions of Hostiensis and and Innocent IV (ad X 3.34.8).

[54] See, e.g., *App. minor*, 433; *App. maior*, 441–42.

[55] If speculation is called for, I suspect that one could make a case that in the case of the tithes, we are talking about direct and unmediated lordship, as opposed to mediated lordship. The analogy would then be with a king having mediated lordship of his subjects' temporal goods versus the Church having unmediated lordship of the goods that the Franciscans use. This idea of the Church's unmediated lordship is quite common in the bulls claim of papal lordship of these goods. Sbaralea noted in a footnote to the phrase "nullo modo spectat" in *Exultantes in Domino* (Martin IV, 1283): "Quod antea sanxerunt Gregorius IX., Innocentius, & Alexander IV., ceterique illorum successores praesertim Nicolaus III." See BF 3:501b (no. 40), note e. This is somewhat inaccurate. Gregory IX only wrote in *Quo elongati* that these things pertained "ad quos noscitur pertinere" (87 [23]). This point is only made explicit for the first time in *Ordinem vestrum* (BF 1:401b [no. 114]), a bull often republished by both Innocent and Alexander. *Exiit* made a similar point, but without using the phrase (2:1114).

### 2.2. *Dominium humanum*

Michael presented a simple account of the origins of human lordship. The prelapsarian condition of humankind was one without *dominia*:

> Omnis divisio dominiorum personalis vel collegialis venit causaliter et originaliter ex divisione animorum. Unde quia in statu innocentiae nulla fuisset divisio animorum, nulla fuisset divisio dominiorum.

And, after citing *Dilectissimis*, Acts 4:32–34, and Proverbs 1:14, he concluded,

> et ita, universaliter, secundum Scripturam et secundum veritatem, omnis communitas rerum, bona vel mala, venit causaliter ex communitate proportionali animorum, et omnis divisio dominiorum venit, per oppositum, causaliter ex divisione proportionali animorum seu cordium. Sed perfecta caritas, cum sit vinculum perfectionis secundum Apostolum [cf. Col. 3:14], excludit omnem divisionem animorum.[56]

Although the reference to Colossians can also be found in a gloss to *Dilectissimis*,[57] it was likely a deliberate jab at the pope, who had employed the idea that charity is the bond of perfection to diminish the importance of poverty,[58] and Michael used it to make the extra point that this meant that the apostles existed without lordship as well.

Human lordship was introduced through human agency. To be specific, "proprietas in rebus fuerit a iure imperatorum sive a iure humano per iniquitatem introducta."[59] Michael cited the usual pair of *Dilectissimis* and *Quo iure* to support his case. Earlier he had explained what it meant for the apostles and those who wished to imitate them in the light of *Dilectissimis*. In short, they have assumed and preserved the state which existed before sin, namely,

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[56] *App. mon.*, 753: "Every personal or collegial division of lordships comes causally and originally from the division of souls. Hence, because there was no division of souls in the state of innocence, there was no division of lordships.… And, thus, according to Scripture and all truth, every community of things, good or evil, universally comes, causally, from a proportionate community of souls, and every division of lordships causally comes, through its opposite, from a proportionate division of souls or hearts. But perfect charity, since it is the 'chain of perfection' according to the Apostle, excludes every division of souls."

[57] *Glos. ord.* ad C. 12 q. 1 c. 2, s.v. "Cor unum et anima una."

[58] See above, p. 35. We should perhaps also qualify the conclusion of Shogimen, *Ockham and Political Discourse*, 58, regarding Michael's attitude towards the supposed "Bonaventuran triangle of poverty, charity and perfection."

[59] *App. maior*, 327: "the ownership of things was introduced by iniquity, by the law of emperors or by human law."

> antequam per iniquitatem introductum esset quod aliquis diceret hoc meum proprium et hoc tuum. Qui status fuit status innocentiae sive legis naturae, statui per iniquitatem introducto contrarius, secundum glossam, quae verbum illud "per iniquitatem" exponens dicit: "Per iniquitatem, id est per consuetudinem iuris gentium, aequitati naturali contrariam […]; vel 'per iniquitatem,' id est per sollicitudinem, ut ibi [Lc. 16:9]: *Facite vobis amicos de mammona iniquitatis*." Haec glossa. Et quod sicut antequam esset peccatum non erat appropriatio rerum temporalium introducta, sed fuisset habitus usus rerum usu consumptibilium et non consumptibilium absque aliqua proprietate, sic fuit in apostolis et apostolicis viris.[60]

The idea of "mine" and "yours" was part of the state that resulted from iniquity; and, as the gloss noted, this phrase referred to a state introduced through the "tradition" of the *ius gentium*, which was contrary to natural equity, or, at least, through what we might call an "anxious care" (for temporal things).

The possessive pronouns *meum*, *tuum*, *suum* (and the genitive of the demonstrative pronouns) often denote a property relationship, but, Michael pointed out, they do not only indicate this sort of relationship.[61] There are in fact four relevant ways these pronouns can be understood. Lordship and ownership are sometimes meant. Michael tellingly used examples where people denied they had *suum* in this (merely) "fourth" sense.[62] The third sense relates to the scriptural idea that a worker is worthy of "his" food (Mt. 10:10), where "his food" must be understood in the sense of "due and wholly fitting wages for labour" (*quoad stipendium debitum et meritum condignum laboris*), for those who preach the Gospel ought to be able to live from it (1 Cor. 9:14). Yet this should not be considered a sign of lordship since preachers were to give and receive freely (Mt. 10:8).[63] The second sense is closely related. It refers to the way prelates *qua* prelates might employ these pronouns. This sense is understood with respect to care and safe-keeping (*custodiam*) and

[60] *App. maior*, 239–40, citing *Glos. ord.* ad C. 12 q. 1 c. 2, s.v. "Sed per iniquitatem": "before it had been introduced by iniquity that someone would say 'this thing is my own, and this one yours.' This state was the state of innocence or state of the law of nature contrary to the state introduced by iniquity, according to the gloss, which says, explaining that phrase 'by iniquity': 'By iniquity, that is, by the custom of the law of nations, contrary to natural equity…; or "by iniquity," that is, by anxiety, as in *Make yourselves friends of the mammon of iniquity*.' This is the gloss. And that, just as the appropriation of temporal things had not been introduced before there was sin, but there had been the habit of the use of things, both consumable and not consumable by use without ownership, so it was among the apostles and apostolic men."

[61] *App. mon.*, 813–14.

[62] *App. mon.*, 705, citing Acts 4:32 and (after equating *suum* and *proprium*) C. 12 q. 1 c. 10 and c. 11.

[63] *App. mon.*, 704.

ministry and stewardship. Prelates have things in order to look after their flock, but, as the Michaelists insisted, this sort of stewardship falls short of true *dominium*.[64] And finally, the first sense Michael chose to discuss is the one that applies to people *alieni iuris*: minors, slaves, and religious. These sorts of people are also allowed to use possessive pronouns when referring to things (e.g., "that's my cloak over there"), but it cannot have the same meaning as it does for those who are *in sua potestate*. For people *alieni iuris*, using a possessive pronoun means something is theirs as it relates to temporal or spiritual *usus*. He cited Augustine for support: unlike superior things, which are to be enjoyed, *aequalia* are for our use. Thus, though something may belong to a servant's lord, it is said to be the servant's because the servant is meant to use it.[65]

At the same time, another gloss from *Dilectissimis* was relevant here. It reads: "Potest ergo aliquis possidere rem cuius proprietatem habere non potest, sicut servus dicitur possidere, id est detinere, Dig. 41.2.24."[66] Michael thus concluded that this sort of possession was not a possession of civil right (*possessio iuris civilis*), but a detention of fact and of natural right (*detentio facti et iuris naturalis*).[67] In other words there is legal possession, a feature of positive law, and a possession in the sense that one is merely holding the thing, which is an action permitted, unsurprisingly, by natural law. And, naturally, one who has legal possession has recourse to the courts if he is despoiled of his physical possession:

> Unde et actio datur in iudicio hominibus sui iuris spoliatis rebus suis quantum ad usum vel alium modum habendi licitum et non solum spoliatis rebus suis quoad proprietatem et dominium. Sicut patet in eo qui emit a domino rei usum rei, si dominus rei postea surripiat ab eo rem illam, datur eidem actio furti contra dominum ratione usus, Dig. 47.2.20.1.[68]

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[64] *App. mon.*, 703–04.

[65] *App. mon.*, 702: "Omnia nostra sunt, scilicet superiora, aequalia et inferiora. Superiora nostra sunt ad perfruendum, ut Deus, Trinitas, aequalia ad convivendum, ut angeli, qui et modo nostri sunt, quia ad usum nobis sunt, sicut res dominorum dicuntur esse famulorum, non dominio, sed quia ad usum sunt eorum." Augustine, *Quaestiones evangeliorum* 2.33.7, in Mutzenbecher, *Augustini quaestiones evangeliorum*, 83, is rather different from Michael's text; the same goes for cross-reference to the text of the gloss to Rom. 8:32 as it is found in Fevardentius, Dadraeum, and Cuilly, *Biblia sacra cum glossa ordinaria* 6:114.

[66] Michael tidied up the gloss a little bit. *Glos. ord.* ad C. 12 q. 1 c. 2, s.v. "possidebat"(!) reads: "Ergo aliquis potest possidere rem cuius non potest habere proprietatem. Argu. contra X 2.26.7(!). Sed dic possidebant, id est detinebant, sicut seruus dicitur possidere. Dig. 41.2.24."

[67] *App. maior*, 240. Ockham never employed this reference.

[68] *App. mon.*, 759: "Hence, an action is given in court to free people despoiled of their things with respect to use or another licit mode of having, and not just with respect to

The use of "licitum" here is liable to confuse since the Michaelists argue that their own use is licit, but not legal in terms of positive law. But Michael was writing about generally valid forms of having, not the specifically extra-juridical licit use that the Franciscans have. Another point to note is the use of "sui iuris": only free men, not minors, not slaves, and certainly not mendicants, are given an action in court if despoiled of their things.

At the start of this chapter I alluded to the fact that *dominium* indicates a relationship of some sort. More specifically, *dominium* refers to an unequal power relationship, and, as such, it was something the Franciscans were keen to avoid. Hence the name Friars Minor. Power in this context means nothing more than an at least licit, if not legal ability to use, misuse, or consume the object over which one has lordship. Michael occasionally equates the two, as, for example, when discussing what a rich man typically grants his poor guests at the dinner table.[69] Michael found civil and canon law justification for this point. He first referred to a passage from the *Code* which states that everyone is a legitimate lord and master of their own things,[70] and then noted that, as we see in the *Decretum*, such a person could sell and transfer their possessions to another.[71] In other words, one cannot have a *ius uendendi* without first having the thing by a *ius proprietatis*, which means it belongs to the person by at least a right of restricted ownership (*ius dominii vel quasi*).[72]

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ownership and lordship. It is clear in the same way in the case of one who buys the use of a thing from its lord, if the lord of that thing steals it away afterwards, an *actio furti* is given to him against the lord on account of the use." An *actio furti* was a private penal action dependent upon the type of theft (manifest or non-manifest); see Berger, "Encyclopedic Dictionary," s.v. "furtum" (480).

[69] See, e.g., *App. mon.*, 828; discussed in detail on p. 186, below. Cf. *App. mon.*, 837.

[70] Cod. 4.35.21: "In re mandata non pecuniae solum, cuius est certissimum mandati iudicium, verum etiam existimationis periculum est. nam suae quidem quisque rei moderator atque arbiter non omnia negotia, sed pleraque ex proprio animo facit: aliena vero negotia exacto officio geruntur nec quicquam in eorum administratione neglectum ac declinatum culpa vacuum est." Although never cited directly, this passage was used before as well, during the debates with the spirituals. See, e.g., *Religiosi viri*, 331–337, in Chiappini, "Responsio 'religiosi viri,'" 667. For its use in medieval legal discussions about property, see also McGovern, "Private Property," 137–38.

[71] *App. mon.*, 815–16: "quia in re propria quilibet est legitimus moderator et arbiter, Cod. 4.35.21. Unde et vendere et eam transferre in alium potest, sicut placet, C. 1 q. 1 c. 21, ubi dicitur sic: 'Omnis enim dominus quod habet, si vult, vendit.' Et Cod. 4.38.14. Et in Inst. 2.1.40, cum similibus." For a similar argument, see *App. maior*, 315.

[72] *App. maior*, 315: "Licet enim rem immobilem alienam possit quis vendere quoad hoc quia tenet contractus in ipsius vendentis praeiudicium, tamen ius vendendi non habet quis rem alienam, praecipue mobilem, nisi habeat in re ipsa ius proprietatis, quia ad eum pertineat iure dominii vel quasi, ut habetur Dig. 18.1.28, in textu et glossa; et in 18.1.34.1." This

It is this sort of talk that relates to Michael's point about power. According to the laws, Michael noted, laymen can dispose of their things as they wish; and it is for this reason that they have the likeness of emancipated sons (in the Roman law sense), for they can dispose of the goods entrusted to them without the consent of their father.[73] On the other hand, a person who is under another person's control can have nothing of his own.[74] For a Franciscan to consider himself to be "in the power of another" was nothing new, of course: it was a general state that all religious were to be in.[75] Michael quoted from the Benedictine Rule to bolster his case. According to Benedict, he said, a monk was not even to have his own body or will *in propria potestate*.[76]

Michael read this monastic commonplace in the light of Roman law. If someone is under someone else's authority (*in alterius potestate constitutus*), that means that he is unable to have anything of his own. Michael recited a long list of authorities in favour of his position.[77] Elsewhere he expanded on this idea and his legal references to argue that someone who is in another's power cannot have anything "by right of ownership and lordship." And slaves, he quoted from the *Digest*,[78] are not considered people with respect

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is an abbreviated version of the property right Bonagratia first described at *De paup.*, 324; see above, p. 122.

[73] *App. maior*, 274: "tamen certum est quod alii fideles possunt de bonis suis secundum iura motu proprio disponere. Unde filiorum emancipatorum similitudinem habent, qui possunt de bonis sibi concessis disponere absque patris consensu."

[74] *App. mon.*, 811: "qui in alterius potestate est, nihil proprium habere potest."

[75] This is clearly tied to the issue of obedience, a topic which was important for all religious orders. Examples in Franciscan literature are easy to find as well: e.g., *Expositio Hugonis* 2 (108.15–18); Bonaventure, *Regula novitiorum* 14.1 (BOO 8:488a); and John Pecham, *Tractatus pauperis* 10, in Kingsford, Little, and Tocco, *Pecham tractatus tres de paupertate*, 31. One of Peter of John Olivi's questions on evangelical perfection was devoted to the issue of obedience; it may be found in Flood and Gál, *Olivi On the Bible*, 373–406. See also Brett, *Liberty, Right and Nature*, 10–20, for general comments.

[76] *App. mon.*, 814. Cf., e.g., *Regula s. Benedicti* 3.7–10 (28), 5.10–13 (38–40), 7.19–21, 34 (46, 48), 33.1–4 (122), in Venarde, *Rule of Saint Benedict*. See Lawrence, *Medieval Monasticism*, 27, for comment.

[77] *App. mon.*, 702 [with respect to the idea that Jacob's exclamation in Gen. 37:33, *Tunica filii mei est*, cannot be taken to mean that Joseph had ownership and lordship of the tunic]: "cum adhuc Ioseph esset puer, in patria potestate constitutus, ut ibi patet, et qui in alterius potestate est, aliquid proprium habere non potest, Dig. 41.2.49.1(!); Dig. 48.5.22(21); Dig. 41.1.10.1. Et Inst. 2.9.1 et 3, cum similibus, quae omnia praedicta inconvenientia illata et quam plura alia brevitatis causa omissa sunt, ridicula et frivola." Regarding the correction I have suggested, compare the quotation given in n. 79, below.

[78] Dig. 50.17.32: "Quod attinet ad ius civile, servi pro nullis habentur: non tamen et iure naturali, quia, quod ad ius naturale attinet, omnes homines aequales sunt."

to civil law. And the same goes for religious, who are in another's power. Therefore, he concluded, religious are unable to have lordship or ownership over anything—as is also clear from canon law.[79]

The Franciscans, of course, fall under the authority (*sub sua gubernatione, protectione et correctione*) of the Roman Church. That is the message of the first and twelfth chapters of the *Regula bullata*. They are, in short, like sons who have been entrusted and subjected, "quodam peculiari et speciali iure," to the care, obedience and power of the holy Roman Church.[80] The point about sons, like the references to slaves and monks elsewhere, was naturally to emphasize their (legal) incapacity to claims of lordship—which was the point of the, in this context, oft-cited Inst. 2.9.1.

It might seem counter-intuitive or disingenuous for Michael to have argued that positive law insisted on the Franciscans' legal incapacity for any lawful *dominium*. After all, if the intention is to show that a group of people do not want a certain set of rights, one's time might be better spent on describing what they have instead, rather than only describing what they do not have. However, the Michaelists were in the paradoxical situation of wanting to describe a right-less state but having no way to do so without articulating how lordship works. When the discussion turns to use we shall see the more constructive aspects of the Michaelist theory, but for now we must deal with the problem of how *dominium* worked in the context of the *ecclesia primitiua*.

### 2.3. Dominium *and the Early Community of Believers*

The division of *dominium* into a divine and human component was important for understanding the property relations of the early community of believers. In the prelapsarian state of nature, as we have seen, Adam and Eve lived without human-based lordship. One of the things Christ did on earth was lead the apostles back to the *status* in which no one said anything was his own.[81] It should be noted, however, that this was not a full return to

[79] *App. mon.*, 843: "Nam qui in alterius potestate est, aliquid iure proprietatis et dominii habere non potest, Dig. 41.2.49.1; et Dig. 41.1.10.1; et Dig. 48.5.22(21); et in Inst. 2.9.1 et 3. Et quantum ad ius civile attinet, servi pro nullis habentur, Dig. 50.17.32. Et idem est in religiosis qui in alterius potestate sunt. Unde in aliqua re proprietatem et dominium habere non possunt, ut dicto C. 12 q. 1 c. 11; et X 3.35.6 in fine. Et qui tamquam mundo mortui reputantur, C. 16 q. 1 c. 8; et Cod. 1.3.54(56). Et religiosi, servi propter Deum effecti sunt D. 54 c. 23. Nec habent velle nec nolle, VI 1.6.27; et C. 32 q. 3 c. 1."

[80] *App. maior*, 274; see also the following pages.

[81] *App. maior*, 327: "Et Christus, omnis perfectionis magister, apostolos suos et vitam

the state of innocence, despite the claims of some contemporary scholars.[82] As Michael wrote, Christ "ad statum innocentiae, in quo nullus aliquid proprium sibi esse dicebat, *quantum ad hoc prout fuit expediens*, revocavit."[83] As far as the Michaelists were concerned, the only practical outcome of this return seemed to be that apostles' *modus vivendi* was one that did not involve ownership and lordship, but remained content solely with use.

The real starting point for Franciscan apologists was, of course, Christ's poverty. The idea that Christ voluntarily chose to be poor, based as it is upon 2 Cor. 8:9, can be found in St Francis's own writings,[84] and the idea is often repeated in Franciscan literature.[85] He was after all the "forma et exemplar evangelicae renunctiationis."[86] Of course, it was never in doubt that Christ was poor, but there was a lot of confusion about what form his poverty took.[87] As we know, Bonagratia discounted the idea that *Ad conditorem* asked about Christ's poverty insofar as he was God; instead it had to be about the time at which he began to preach publicly, that is, when he began to call the apostles.[88]

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ipsorum perfectissime imitari volentes voluit eruere ab omni concupiscentia et sollicitudine rerum temporalium, quae maxime ex appropriatione rerum temporalium introducitur, et ad statum illum reducere in quo nullus sibi aliquid proprium esse dicebat." Cf. *App. maior*, 355.

[82] As Lambertini, "Fragments," 194, rightly stressed.

[83] *App. maior*, 238 (emphasis added); other passages, e.g., *App. maior*, 327–28, need to be read in light of this point.

[84] Francis of Assisi, *Epistola ad fideles* (*Recensio posterior*) 5, in Esser, *Opuscula*, 115–14: "Qui [Christ], *cum dives esset* (2 Cor. 8:9) super omnia, voluit ipse in mundo cum beatissima Virgine, matre sua, eligere paupertatem." Cf. *Regula bullata* 6.3 (231–32); *Regula non bullata* 9.3–9 (258–59); *Fragmenta alterius regulae non bullatae* 73 (173); *Fragmenta expositioni Regulae OFM fratris Hugonis de Dinia inserta* 19 (178). Cf. St Francis's bull of canonization, *Mira circa nos*, in BF 1.42–44 (no. 25).

[85] Many examples could be given; let the following suffice: Thomas of Celano, *Vita prima S. Francisci*, 1.28.76 (AF, 10:57); *Iuliani de Spira vita sancti Francisci* 47.5 (FF, 1066); *Compilatio Assisiensis* 51, 114 (Bigaroni, *« Compilatio assisiensis »*, 114, 354); Thomas of Celano, *Vita secunda S. Francisci* 2.43.73 (FF, 512); Bonaventure, *Legenda maior* 7.7 (BOO 5:524b), and his sermon on the translation of St Francis, in Lerner, "Collection of Sermons," 497; *Speculum perfectionis* (*minus*) 42.9 (FF, 1821); *Speculum perfectionis* 18.5 and 23.15 (FF, 1876 and 1887); and *Historia, prol.* (48–49, 53–55, 57).

[86] *App. mon.*, 675.

[87] See the summary account in Garnsey, *Thinking about Property*, 59–83. Glenn Olsen has written a number of valuable articles on medieval views of the *ecclesia primitiua* as well: "Idea of the *Ecclesia primitiva*"; "St. Boniface"; "Bede as Historian"; "Reform after the Pattern of the Primitive Church"; "Image of the First Community of Christians"; and "Reference to the *ecclesia primitiva*."

[88] *De paup.*, 323.

This answer proved unsatisfactory to John. And in *Quia vir* he argued that Christ had lordship and, more importantly, acquired more of it over time while on earth.[89] Michael once described this as the first of the principal errors of the pope's bull. However, to consider in detail the nature of Christ's lack of lordship would take us beyond the scope of Michael's theory of property rights, so it must suffice for now merely to note that this was the Michaelist position. Much more important for this theory is the nature of the apostolic renunciation of lordship, for the nature of apostolic poverty corresponded directly to the type of poverty that the Franciscans wished to emulate.

The crucial starting point for the Michaelist position was that Christ enjoined the need to live without lordship,[90] and that the apostles *vowed* to follow this way of life.[91] He constantly repeated that the Franciscans follow as best they can in the footsteps of the apostles. This is the very thing that the *professio apostolica* consists of: the absolute abdication of the ownership of all temporal things.[92] And, at an individual level, all religious vow to live *sine proprio*, as the rules of Sts Basil, Augustine, Benedict, and Francis demonstrate.[93]

John, at least in Michael's interpretation, denied that the apostles had made the sort of vow Michael described. In the *Appellatio minor* Michael quoted a part of *Quia quorundam*:

> Tum quia in dicto statuto *Quia quorundam* expresse improbat sententiam adserentium "quod abdicatio iuris in cuiuscumque rei proprietate et in eius usu per quod potest sic utens pro usu huiusmodi quomodolibet contendere vel in iudicio litigare, est meritoria et sancta et a Christo in se ipso servata apostolisque imposita et ab ipsis sub voto assumpta."[94]

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[89] *QVR*, 594–97.

[90] See, e.g., *App. maior*, 281, 339 (cf.), 355; and *App. mon.*, 635, 668–69, 672–73, 714, 788.

[91] We have already seen what John thought of the triple monastic vow of poverty, chastity, and obedience (above, p. 30). Michael never explicitly dealt with *QE*, but he did mention repeatedly the importance of this vow for all religious; see, e.g., *App. maior*, 228, 248, 262, 335, and 361.

[92] *App. maior*, 233.

[93] *App. mon.*, 721; cf. *App. mon.*, 811. Of course, this vow does not entail the abdication of the use of all temporal things: *App. maior*, 233. Michael wrote at one point that the Franciscans vowed to follow Christ "in abdicatione proprietatis usus et rei cuiuscumque dominii" (*App. maior*, 261), but *usus* as it is described in the next quotation.

[94] *App. minor*, 443: "First, because in the said decree, *Quia quorundam*, he expressly condemns the opinion of those who assert [1] that the abdication of the right to the ownership of any thing whatsoever, and to its use (through which right, the one so using can in some fashion contend or litigate in court for such use), is meritorious and holy, and [2] that it was

This was precisely the vow the Franciscans and, a fortiori, the apostles had vowed.[95] The apostles swore *potentissime* a vow of possessing or having nothing by right of property.[96] The basis for this idea derived ultimately from a passage in the *City of God*, where Augustine described Matthew 19:27—*Ecce, nos reliquimus omnia*—as a vow made *potentissime*.[97] Michael did not tire of repeating this passage,[98] nor did he refrain from building upon it. The verse from Matthew, a favourite of Franciscan apologists, said that the apostles had "sent everything away"; to Michael that meant it was a vow of leaving everything behind (*omnia relinquendi sive dimittendi*) and that the mode of leaving everything behind, at least as far as ownership and lordship, therefore fell under such a vow.[99]

A related point was that this vow was not, as the pope had suggested, merely a vow of renunciation "quoad curam et affectionem."[100] Michael interpreted Luke 14:33—*sic ergo omnis ex vobis qui non renuntiat omnibus quae possidet non potest meus esse discipulus*—to mean that this had to be a vow of renouncing *simpliciter et absolute*, for this is what "everything one possesses" means. And to renounce everything "only with respect to affection and care" is to renounce only *secundum quid*.[101] In his earlier *Appellatio maior*, Michael quoted from the *Decretum* to the same effect. To renounce in the way the pope suggested, in short, would be to renounce imperfectly, not perfectly, which is surely not the way Christ intended.[102] And although this perfect renunciation means renouncing lordship and ownership, it does not and cannot include as well the use of things necessary for life.[103]

There were, of course, more than apostles in the early Church, and it was a feature of Michaelist ecclesiology that one's status within the Church was reflected in the level of expropriation to which one was committed. As Acts

observed by Christ himself, and imposed upon the apostles, and assumed by them under a vow." Michael was quoting from *QQM* 255–258, 261–262 (278–79), itself a quotation of the *App. Sachs.*, 150. John elaborated on his position in *QVR*, 560, and 565; this was the meat of the third error Michael found in *QVR*: *App. mon.*, 710–35.

[95] *App. mon.*, 726.

[96] *App. maior*, 356: "Quia hoc votum nihil possidendi sive iure proprietatis habendi potentissime voverant."

[97] Augustine, *De civitate Dei* 17.4, in Dombart and Kalb, *Augustini de civitate Dei* 2:559.

[98] See *App. maior*, 233, 352; *App. mon.*, 724; cf. *App. minor*, 432.

[99] *App. mon.*, 671: "modus relinquendi sive dimittendi omnia quoad proprietatem et dominium."

[100] *QVR*, 563.

[101] *App. mon.*, 672.

[102] *App. mon.*, 673.

[103] *App. mon.*, 720–21.

2:44–45 and 4:32–35 show, the early community of believers opted for a sort of communism whereby all things were held in common and distributed on the basis of need. Michael took this to mean among other things that no one of the believers had personal lordship or ownership of any temporal thing.[104] This lack of lordship was, furthermore, not only true "ante distributionem," but held afterwards as well.[105] After all, it was a division of use, not of lordship and ownership. Since a gloss of Bede's noted that we call those who live in such a way that all things are common 'cenobites,'[106] the conclusion was felt to be obvious:

> Patet etiam hoc ex eo quod monachi sive coenobitae, qui tenent figuram sive formam dictae multitudinis credentium ex professione abdicant a se proprietatem omnium temporalium in speciali.… Patet quod forma perfectae abdicationis et renuntiationis monasticae vitae fundatur directe super formam abdicationis et renuntiationis primorum credentium, Actuum 4 recitatam.[107]

Monks thus hold the form of the first believers,[108] which is the point of X 3.35.6 when it explains that present-day monks must live *sine proprio*.[109] Thus, although Michael sometimes would compare monks to apostles,[110] the comparison sat uneasily with him, and he would periodically be forced to elaborate that this was only true with respect to individual poverty (*quoad abdicationem propriorum*).[111]

The fact that we can talk about monks as holding the form of the apostles but also (more accurately) holding the form of the first believers provides the clue to how Michael would understand *Nimis prava* (X 5.31.17), which stated

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[104] *App. mon.*, 675: "Tum quia erant illis omnia communia; ubi autem sunt perfecte omnia communia, sicut erant in illa communitate, ibi nihil est proprium, cum idem apud eosdem non possit simul esse commune et proprium. Et idem, scilicet quod 'suum' ibi intelligatur, id est 'proprium,' probatur C. 12 q. 1 c. 8; et c. 9; et c. 11.… Et ita per se manifestum est quod in illa multitudine credentium nullus habuit proprietatem et dominium alicuius rei temporalis.…"

[105] *App. mon.*, 718; cf. 806–07.

[106] *App. mon.*, 804–05; the reference to Bede is to a marginal gloss to Acts 4.32, s.v., "communia," in Fevardentius, Dadraeum, and Cuilly, *Biblia sacra cum glossa ordinaria* 6.1025.

[107] *App. mon.*, 805: "This is also clear because monks or cenobites, who hold the pattern or form of the multitude of believers, abdicate, by their profession, individual ownership of all temporal things.… It is clear that the form of perfect abdication and renunciation of the monastic life is based directly on the form of abdication and renunciation of the first believers recited in the fourth chapter of Acts."

[108] *App. mon.*, 806; *App. maior*, 231.

[109] *App. maior*, 272–73.

[110] E.g., *App. mon.*, 672, 715.

[111] *App. mon.*, 724. It is important to remember that the monastic vow of poverty, at least as Michael saw it, extended even to necessities: *App. mon.*, 814.

that both the Franciscans and Dominicans "were servants of the poor Christ in the strictest poverty" (*in artissima paupertate Christo pauperi famulentur*). Among Christ's disciples things were still held in common without any individual lordship. John had suggested that many disciples had had things in a proprietary sense, at least after they had returned from the preaching mission Christ had sent them upon.[112] But Matthew 19:27 applied equally to the disciples,[113] for the apostles were essentially just a special class within the disciples.[114]

There was, however, still a big difference between the apostles and the other disciples. This difference is seen in the level of expropriation each group vowed and practiced, much like the contemporary difference between the mendicant orders. In terms of the apostles' individual lack of lordship, they served, along with the disciples, as the model for all religious.[115] But, considered as a whole, the entire community of the apostles also had no *dominium*. The apostles were a distinct group within that community, and their collective lack of lordship was one of the external manifestations of this fact. Here the basic problem with the pope's account was that it confused the ecclesiology of the early Church. John had thought that as far as the divestment of worldly goods was concerned, there were only two groups to consider, for Christ never gave a separate *lex vivendi* for the disciples and apostles.[116]

In Michael's ecclesiology the disciples inhabit a hazy position; but perhaps it is because we are simply to know that they fall in an intermediate position between the apostles and the multitude of believers. In terms of their poverty, the disciples left all behind. John had written that some disciples had had many things, such as Joseph of Arimathea, Lazarus, Martha, Mary Magdalene, and Tabitha—and it was also, he claimed, the point of *Dilectissimis*, which had said a common life was necessary for those who wished to imitate the life of the apostles and their disciples.[117] Michael detailed the contradictions that would arise from such a position. If Christ gave

[112] *QVR*, 601.

[113] According to *App. mon.*, 746–47, this was the sixth "error" of *QQM*; cf. *App. maior*, 345.

[114] *App. mon.*, 718: "apostoli, qui fuerunt primi et potissimi discipuli Christi…." And *App. mon.*, 719: "cum constet quod apostoli non fuerunt minus perfecti post assumptionem ad apostolatum quam post assumptionem ad discipulatum…."

[115] *App. mon.*, 672.

[116] *QVR*, 600: "Nec reperimus quod Iesus, Dominus noster, aliam legem vivendi discipulis dederit et aliam apostolis suis." This idea was not novel to the pope; see Congar, "Aspects ecclésiologiques," 54–63, for earlier polemical uses.

[117] See *QVR*, 600.

the same rule to the apostles and disciples, as the pope had said, and certain disciples had individual lordship, then the apostles, after having attained the apostolate, would have been able to have individual lordship as well.[118] The solution was that the pope had obviously confused the status of some of the believers. Martha and Mary were not subject to the prohibition issued in the synoptic gospels (Mt. 10:9–10; Mc. 6:8–9; Lc. 9:3) against possessing gold, silver, or money since they were the ones who ministered to Christ from their own resources; and the same goes for Tabitha, who gave alms, and Joseph, who was admittedly a rich man.[119] The real disciples—Joseph is described as a "discipulus occultus"—the seventy-two disciples, were marked out by being enjoined by Christ to preach, and none of the people mentioned by John belonged to this category.

On a similar note, we know that Christ also gave a different law and mode of living regarding poverty, chastity, and obedience. As for poverty, Matthew 19:21, provides explicit instructions for those who wish to be perfect. These instructions provide the boundary line between an observance of the precepts of necessity and the counsels of supererogation. The implication is that only the apostles are entirely subject to these counsels, but Michael muddied the waters by insisting then that it would "destroy all religion" if there was no difference between the "observantiam necessitatis praeceptorum et observantiam supererogationis consiliorum evangelii."[120]

Michael's discription of poverty in the *ecclesia primitiua* offers us some clear parallels with the institutional Church. The Church belongs to the adapted version of Bonaventure's fourth *communitas temporalium rerum*.[121] The fourth community describes the ecclesiastic community, which "includit quasi proprietatem, non personalem sed collegialem, non civilem et mundanum sed ecclesiasticam."[122] This is what the oft-cited passages of Acts and the decree *Futuram* (C. 12 q. 1 c. 15) refer to.[123] The crucial point is that though a *ius ecclesiasticum* only provides *quasi proprietas* to the houses, estates, and other goods held in common by the ecclesiastical community,

[118] *App. mon.*, 736.

[119] *App. mon.*, 737.

[120] *App. mon.*, 737–38: "the observance of the Gospel's precepts of necessity and the observance of its counsels of superogation." He cited Mt. 19:12 and Mt. 16:24 as examples of the supererogatory counsels of chastity and obedience.

[121] See Appendix A.

[122] *App. maior*, 340: "includes quasi-ownership, not personal but collegial, not civil and worldly but ecclesiastical."

[123] Although it is not at all clear from the text of G&F, 340, Michael went on to quote half-tacitly, but liberally from this and C. 12 q. 1 c. 16.

this community can take action and sue in court. This is why we say that the ecclesiastical community is said to have *quasi proprietas* and *dominium utile*, or what I have elsewhere called "restricted ownership." That is, the Church can, although in a more limited fashion, treat its goods in the same way that a secular lord can, but these common goods do not revert to individual members at the community's dissolution in the way the goods of a secular corporation would.[124]

Although the other religious orders share clear parallels with the form of the primitive Church, it is important to remember that they exist on the basis of this fourth *communitas*.[125] Dominican common ownership, e.g., is grounded in the fourth Bonaventuran community, not the third; that is, in the *ius ecclesiasticum*, not *ius ciuile*. Significantly, he noted, this sort of ownership did not exist in the time of Christ and the apostles, nor even in the primitive Church. After the Church was endowed, however, monks and canons regular had things in common. So did the mendicant orders, but they had less than they needed, which meant that they needed to beg. Thus, Gregory IX said in X 5.31.17 that these mendicants serve Christ in the highest poverty with respect to the other religious orders, who do have a sufficient amount of goods in common and are not compelled to beg, though they do not have individual property. Here is the crucial point: they do not serve Christ in the highest poverty "simpliciter et absolute," which Christ, the apostles, and those following them perfectly in the primitive Church observed—not appropriating for themselves, that is, a home, place, or anything else in common.

The significance of *dominium* to Michael's ecclesiology is clear, although the exact details remain elusive insofar as he does not always distinguish clearly between the three groups that made up the early Church. Sometimes he contrasted apostles to the multitude of believers, sometimes apostles to disciples, and sometimes gentile converts to the faith to Jewish converts. From these scattered comments, however, it appears that Michael tended to the view that the degree of expropriation of temporal goods corresponded to three basic groups within the Church: the general multitude of believers, the disciples, and the apostles.

If we examine the correspondence between medieval religious and those who were a part of the early Church in terms of *dominium*, there are some obvious parallels (Table 4.1). The apostles and the Franciscans line up perfectly

[124] See pp. 110 and 270 for the quotation and reference to the *Digest*.

[125] What follows is a lengthy paraphrase of *App. maior*, 346.

| Early Church | Level of Poverty | | Medieval Church |
|---|---|---|---|
| Apostles | the highest poverty *simpliciter*: complete expropriation, both individually and in common | the highest poverty *simpliciter*: complete expropriation, both individually and in common | Franciscans |
| Disciples | the highest poverty *secundum quid*: complete personal expropriation | the highest poverty *secundum quid*: complete personal expropriation; an insufficient amount of goods held in common, which necessitates mendicancy | other mendicants |
| Early converts | personal expropriation; common things shared to individuals on the basis of need | personal expropriation; religious communities have common lordship | cenobitic monasticism |

Table 4.1: Poverty in the Early Church and Medieval Church

as we might expect of a Franciscan author. Christ's disciples and the other mendicant orders line up well as well. Both practice the highest poverty, but do so *secundum quid*. For the mendicants, what distinguishes them from monks is that they hold lordship in common, but in an insufficient quantity of goods, which forces them to have to beg on occasion.[126] In this they are thus like the apostles. Presumably the need to beg was true of the disciples as well when they were sent on preaching missions. Monks, like the general community of believers, voluntarily choose personal poverty, living from the common goods of their community. Monks are also like the general community in that they do not exercise an active pastoral ministry. There is one further difference that truly sets the Franciscans apart from the other forms of religious life. The way Michael describes contemporary religious life, monks and other mendicants are grounded in the *ius ecclesiasticum*, which only came to be after the endowment of the Church by Christian princes. Yet because Franciscans have renounced what is, in the final analysis, merely a temporal community, content instead with the second community (which is based on divine law), they are a group that truly emulates the lifestyle of their exemplars, the apostles.

This is not a picture that would likely appeal to any but fellow Franciscans, of course, which may explain why the Michaelists often based their counter-arguments on the claim that John's position actually enervated the root of *all* religious orders by turning them and the rest of the early community of believers into individual property-holders.

Overall, we could say that Michael described *dominium* as a necessary evil, or at least the necessary result of a non-necessary evil. In the state of innocence the natural resources that produced food (*res ad pastum deputatae*) were common. But "usurpation introduced private or exclusive right" (*ius privatum sive proprium*) and "appropriation with regard to temporal things was introduced through human laws, or laws of kings and emperors" (*appropriatio in rebus temporalibus fuerit introducta per iura humana sive regum et imperatorum*). The unlawful seizure of what had been common things introduced private *ius*; subsequent appropriation was then introduced through positive law. The missing middle step was well-described

[126] This is in many ways a nuanced version of what Bonaventure said in *Ap. paup.* 7.4–5 (BOO 8:273a–b), where the divide is between apostles and the *turba credentium*; Bonaventure compared these two groups to mendicants and monks respectively. Olivi quoted part of this in his *Tractatus de usu paupere*, in Burr, *Petrus Ioannis Olivi*, 154; cf. *QPE* 8, 178–79. Lambertini, *La povertà pensata*, 164, called this second group disciples, which seems slightly misleading.

by some of the decretists. As Rufinus suggested, what derives from long use is done *iure consuetudinis*, not *iniquitatis peruersitate*.[127]

Yet these *iura* can be renounced.[128] This is what the religious do, which means they make do without lordship, remaining content with natural and divine law instead.[129] This means they have renounced a certain type of power relationship. For a vow to leave everything behind without qualification, means lacking the power to have temporal things, not merely lacking the acts of willing and having them.[130] A Franciscan's vow of poverty means forsaking the will to have temporal goods, certainly, but it also means forsaking the power to have them in a legal capacity.

To conceive of *dominium* as a power was not new with Michael, but it is useful for understanding why the Michaelists insisted that the papal *retentio dominii* was not bare, empty, or useless. The fact that lordship is a legal power shows that it cannot be useless or prevent the one holding it from being considered *dives*. God, after all, who holds universal lordship, never enjoys the fruits of temporal things, yet we do not hesitate to call him rich.[131] Conversely, then, lacking lordship does in fact make one poorer.[132]

### 3. *Francis of Marchia*

Compared with what little Francis had to say about law, he had a wealth of things to say about *dominium*.[133] Like Michael, he felt this was partly due to the fact that Scripture was not precise when talking about property, which has led to some confusion on the matter. The Bible often spoke about something being "his" or "hers," or "mine" or "yours", but it used these pronouns equivocally and interchangeably as regards lordship and use.[134] One purpose of Francis's text is to clear up ambiguities like these in order to appreciate

[127] See above, p. 88.

[128] *App. maior*, 240.

[129] *App. maior*, 241.

[130] *App. mon.*, 724: "cum in voto simpliciter temporalia relinquendi includitur carentia potestatis habendi temporalia et non solum actus volendi et habendi ea."

[131] *App. mon.*, 661–62.

[132] *App. maior*, 313.

[133] Note that Francis also dealt with the issue of *dominium* and the types of *ius*, particularly as it existed in the *status innocentiae* in his commentary on the *Sentences*. It falls outside the goal of this chapter to consider these earlier writings, but one may consult some of Roberto Lambertini's essays on this topic: "La proprietà di Adamo"; "Oltre la proprietà"; "A proposito del IV libro"; "Natural Law"; and "Questioni di Francesco."

[134] *Improbatio* 250 (149).

who did or did not have lordship at various moments in biblical history with a view to what implications this would have for the Franciscan order. We shall follow in this section the same approach employed for Michael. First we shall look at the the distinction between divine and human lordship, then we shall consider human lordship as it existed and was instituted from the time of Adam and Eve through to that of Christ and the apostles.

### 3.1. *Dominium diuinum*

All lordship comes from God. While this was an important point for contemporary authors of a hierocratic persuasion,[135] Francis did not think this was a surprising or highly significant point. On the basis of a line from the Psalms, where it is said that God "terram dedit filiis hominum" (113:16), Francis explained that God gave the land for humankind's management and regulation (*dispositioni et ordinationi*); and for that reason it is not necessary to have some immediate and individual licence from God—even if it is true that the division of lordship was mediately introduced by the will of God. The important point, as we shall see, was that this division was immediately introduced by human law, not divine.[136] Interestingly, the source of this part of Francis's refutation derived from the pope's forced reading of Augustine in C. 23 q. 7 c. 1. According to the pope, when Augustine said that "things of the earth cannot be rightly possessed by anyone except by divine law, whereby all things belong to the just, or by human law, which is in the power of the kings of the earth," he only said this when he was disputing with heretics, not that he held this as true.[137] The pope was reaching here for this was neither Augustine's point in the context of the actual letter,[138] nor a common reading of this text in canonistic circles.[139] Francis, however, seems not to

[135] Loosely speaking, hierocratic thinkers tended to the belief that secular rulers derived their legitimacy from the pope, and the pope from God. But this is hardly to do justice to a complex topic with a rich historiography of its own. A useful but lengthy introduction to this topic may be found in Watt, "Spiritual and Temporal Powers"; McCready, "Problem of the Empire" and "Papalists and Antipapalists," are also quite lucid.

[136] *Improbatio* 895 (384): "Ideo Propheta dicit quod *terram dedit filiis hominum* id est tradidit dispositioni et ordinationi filiorum hominum: unde non oportet aliam licenciam specialem et immediatam Dei habere, etsi uerum est quod diuisio dominiorum de uoluntate Dei introducta est mediate, quomodo omnia sunt a Deo mediate que sunt ab homine immediate, set immediate introducta est a iure humano et non diuino."

[137] *Improbatio* 856–858 (372).

[138] See Augustine, *Epistola* 93.50, in Daur, *Augustini epistulae LVI–C*, 203.

[139] The *Glos. ord.* ad C. 23 q. 7 c. 1, s.v. "divino," e.g., argues that Augustine meant *ius divinum* in the sense of *ius canonicum* (an idea found in *Glos. ord.* ad D. 8 c. 1, s.v. "nam iure divino").

have known this, for in his response he explained that Augustine spoke there "de iure diuino quo omnia sunt communia et nichil alicui proprium, et non loquitur de iure diuino quo aliquid alicui appropriatur quoad dominium proprietatis, de quo est questio."[140] That is, Francis dismissed the pope's point because he had confused questions of proprietary lordship with those of use.

In certain other cases we can imagine that God had a *dominium speciale* different from his *dominium actuale*, which is held over everything in general.[141] This special lordship, which is of sacrifices and offerings, is "liberum et absolutum"—and God's alone: his priest and ministers use these things, but they certainly do not have free and absolute lordship of them, even if the thing in question is consumed through their use.[142]

The only other lordship directly instituted by God was of a very unique type. Although the first division of things was introduced immediately by human will, and the general division of all lordships was introduced universally through the laws (*iura*) of kings and princes, Francis was still willing to admit that *quoddam dominium speciale* of the Jews in a certain portion of the earth was introduced by divine law.[143] However, Francis is careful to point out how different this was from the *dominia* about which we are accustomed to think:

> Set illud fuit dominium quoddam speciale priuilegiatum, quod se habuit ad dominium commune humana uoluntate introductum sicut priuilegium speciale ad legem communem et generalem, ideo fuit introductum posterius tempore, humano dominio, et finaliter etiam cessit tempore Romanorum, et subest nunc etiam, humano iuri seu dominio, propter quod tempore Christi, mota questione utrum deberent dare tributum Cesari an non, Christus respondit: *Reddite que sunt Cesaris Cesari et que sunt Dei Deo* (Mt. 22:21), ubi Christus

A quick look through Rufinus (Singer, *Summa decretorum*, 412), and Paucapalea (Schulte, *Summa Paucapaleae*, 102–03) add nothing; the *Summa parisiensis* (McLaughlin, *Summa Parisiensis*, 220) is merely concerned with returning goods to converted heretics; the so-called *Summa magistri Rolandi* (Thaner, Summa *Magistri Rolandi*, 95–96), stresses the importance of possessing *iure*. Finally, Huguccio (Přerovský, *Summa Decretorum*, 126), seems to take Augustine at his word. No one seems to doubt Augustine's sincerity.

[140] *Improbatio* 896 (384): "about the divine law whereby all things are common, and nothing is exclusive to anyone, and not about the divine law whereby something is appropriated to someone with respect to the lordship of ownership—about which there is a question."

[141] *Improbatio* 10–11 (50–51). This distinction seems to be original with Francis, but remained little used by Ockham; see, e.g., *OND* 103.85–98 (2:766), and 106.66–83 (2:772).

[142] *Improbatio* 12–14 (51–53); cf. 395 (210–11), where the same argument is made, but with a slightly greater emphasis on what implications this has for determining whether use can be separate from lordship.

[143] *Improbatio* 879 (379).

> clare ostendit dominium proprietatis illi populo a Deo traditum, iuri humano tunc temporis dedisse locum.[144]

In a sense, this privilege was the complete reverse of the "privilege" that the Franciscans sought: the Jews gained a lordship founded in divine law, while the Franciscans abdicated a lordship founded in positive law. More intriguing, perhaps, is his observation that this divine lordship was introduced after the division of lordship introduced by positive law. This suggests that we should probably assume that it was qualitatively different from the divine lordship that existed in the state of innocence. No less importantly, Francis argued that this (later) divine lordship has come to exist under human lordship. These two claims admittedly complicate Francis's picture of *dominium* as it pertains to its foundation in *ius*. Unfortunately, Francis did not see the significance of his argument beyond pointing out that they highlight the fact that the lordship "de quo est questio" was one of human lordship.

### 3.2. *Dominium humanum*

Unlike John, who took *Dilectissimis* to mean that there was lordship in the state of innocence and that the division of lordship took place "per peccatum primorum parentum,"[145] Francis argued that there was no proprietary lordship at that time. There was a common type of lordship then, it is true, but this was of a very different type of lordship from what we experience today. According to Francis, as even a completely rightless person has a "ius nature [derelictum ex primeuo iure nature] in rebus proximi sibi neccessariis" in the case of extreme necessity, so:

> multo magis primeuum ius seu dominium nature, institutum ante lapsum, fuit alterius generis et condicionis a quocunque dominio seu iure per iniquitatem, siue proprio siue communi, quia illud fuit dominium iure libertatis et perfectionis naturalis; istud uero est dominium seruilis neccessitatis et coacte

[144] *Improbatio* 880 (380–81) "But that lordship was a certain special privileged kind, which is related to the common lordship introduced by human will, just like a special privilege is to a common and general law; it was introduced therefore at a later time by human lordship, and it finally ceased in the time of the Romans, and now it even exists under human law or lordship; on which account, when a question was raised in the time of Christ whether they ought to give tribute to Caesar or not, Christ responded: *Render unto Caesar what are Caesar's, and to God what are God's*, where Christ clearly showed that he had then given the lordship of ownership, which had been handed down to the people by God, a place in human law." Ockham would make a similar claim.

[145] *Improbatio* 252–253 (151–52). *Improbatio* 267 (157): "Hec sunt uerba sua [John XXII] ad litteram, in quibus uerbis dicit … quod primis parentibus omnia temporalia fuerunt 'data ad habendum' quoad dominium: quod uerum est et non negamus."

> potestatis quia nisi homines coactiua potestate prohiberentur, quilibet, ut plurimum, uellet, si posset, totum usurpare.[146]

Present day lordship is one of servile necessity and of forced rule because, after the fall, humankind must be restrained by this coercive power. Otherwise, nowadays, individuals would want to usurp everything they could for themselves. Francis's assessment of the inherent selfish nature of postlapsarian human beings is quite negative. Prelapsarian common lordship, however, was completely different: it was one based on the law of liberty and natural perfection. Therefore, he concluded, although all things were common in the state of innocence "quoad dominium naturale," there was not yet any proprietary lordship, which was only introduced through sin.[147]

In addition to the lordship found in the state of nature being different from that which currently exists, Francis further explained that this natural lordship was always common. John, as we have seen, believed that Adam had individual lordship in Paradise before the formation of Eve.[148] But Francis, on the basis of Genesis 1:27–28, argued that since the concession of lordship came after the blessing, it is clear that he gave it to both together in common.[149] Francis also argued that this was clear by reason as well, for

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[146] *Improbatio* 258 (153–54): A person caught in extreme necessity "has a right of nature [left over from the primeval right of nature] … therefore, the primeval law or lordship of nature, instituted before the fall, was of a much different kind and sort from any sort of lordship or right [introduced] by iniquity, whether esclusive or common, for it was a lordship by the law of liberty and of natural perfection; but that [later] lordship was of servile necessity and coercive power, for, unless men were prohibited by a coercive power, each one, as often as he could, if he could, would wish to usurp the whole."

[147] *Improbatio* 259 (154). Francis also provided (256 [153]) what might be termed a philosophical account of why these two types of lordship are different: "Consimiliter dominium introductum 'per iniquitatem,' siue proprium siue commune, est alterius generis a dominio communi naturali omnium quod fuisset si homo non peccasset, et distat ab eo plusquam acetum a uino, quia se habet ad illud sicut corruptibile ad incorruptibile, et diuisibile ad indiuisibile. Quod patet quia illud quod continet eminenter perfectionem duorum genere distinctorum, est alterius generis ab utroque genere eminenter contento; set dominium commune collatum ante lapsum primis parentibus continebat eminenter perfectionem dominii particularis et dominii uniuersalis per iniquitatem introducti, quia illud dominium non fuit minoris perfectionis in se quam sit utrumque dominium, particulare et uniuersale simul sumptum, post lapsum introductum. Que duo dominia, uniuersale et particulare, sunt genere distincta; ergo illud dominium fuit alterius generis ab omni dominio per iniquitatem introducto, siue uniuersali siue particulari, siue proprio siue communi, siue immediato siue mediato."

[148] Above, p. 45.

[149] *Improbatio* 862 (373–74); see also 476–479 (246–47); and 482–485 (248–50). Miethke, "Paradiesischer Zustand," 528, argued that this was one of Francis's unique contributions to the debate; cf. Lambertini's extended discussion in *La povertà pensata*, 205–15.

God would never take back this lordship once it had been conferred upon Adam except due to sin (*demerito peccati*). According toFrancis, were God to have conferred individual lordship upon Adam before the creation of Eve, then when he conferred common lordship upon the two of them, Adam would have lost his earlier sole lordship "nulla causa peccati interuenien-te."[150] Indeed, had there been no first sin and all remained in Paradise, any offspring would share in that common, natural lordship as well, for "illud dominium non fuisset sibi traditum pro se solo, set pro omnibus contentis uirtualiter in ipso."[151] This is the closest Francis came to defending the gen-eral sanctity of rights. Ockham would not only make a stronger claim about the wrongness of depriving one of his (property) rights without cause and about how primeval *dominium* was common to all, he also he appealed to a canon law maxim to legitimize his argument.[152]

Had there been no sin, of course, there would have been no division of things "quoad dominiorum proprietatem": all would have been common to all.[153] Specifically, Francis argued that everything would be common in three ways, namely, with respect to lordship, the power of using, and a shared means of support (*commune solatium rerum*). This mirrors what has happened since the Fall: now division has occurred in three ways, namely, an appropriation of lordship, an appropriation of the right of using, and the appropriation of private means of support and joy.[154]

After the Fall, and discounting the special privilege the Jews had directly from God, humankind was directly responsible for the division of lordship, either through the law of kings and princes as it was commonly done in Fran-cis's day, or through the authority of those who held the place of princes.[155] In this way Cain and Abel were possibly the first to hold proprietary lordship; that is, though they were not kings,[156] in some way they nevertheless held the place of princes (or, failing that, they could do this by the authority of Adam, for he held the place of *princeps primus*).[157] After the Flood, Noah was in a similar situation: *even if*[158] he had individual lordship over the wine he

[150] *Improbatio* 863 (374); see also 486–487 (250).

[151] *Improbatio* 864 (374): "that lordship was not given to him for himself alone, but for everyone virtually contained in him"; see also 488–489 (250–51).

[152] See the discussion on pp. 118 and 310.

[153] *Improbatio* 80 (83).

[154] *Improbatio* 263 (155).

[155] *Improbatio* 883 (381).

[156] Francis is quoting John from *Improbatio* 845 (369).

[157] *Improbatio* 890 (382); cf. 872–873 (377).

[158] See *Improbatio* 892 (383), for Francis's doubts about whether this claim is true.

drank (Gen. 9:20–21), "fuit magis iure humano quam iure diuino." The reason Francis offered is reminiscent of John of Paris's famous theory that lordship could be acquired by means of one's own industry. According to Francis, this was more by "ius humanum"—the term could equally be translated as "right" or "law" here—"in quantum scilicet plantauit uineam ex qua natum est uinum, et ita fuit suum, si fuit eius proprium, ratione laboris proprii quo ipsum acquisiuit et non collatione immediata Dei."[159]

After the Flood, God conferred what Francis called a "dominium commune omnium inferiorum" upon Noah and his sons, but he did not create individual *dominia* among them (*non diuisit inter eos dominia rerum*) Francis instead read Genesis 9:1–4 to mean that humans themselves created *dominia* among themselves.[160]

In other words lordship was introduced by human and not divine will (*uoluntate humana immediate et non uoluntate diuina*), both before the Flood and after. And later on a "diuisio generalis omnium dominiorum" was universally introduced through the *iura* of kings and princes. This, he concluded, was what Augustine had been trying to get at in *Quo iure*.[161]

### 3.3. Dominium *and the Early Community of Believers*

Earlier generations of Franciscans were relatively uninterested in relating their community to the state of innocence.[162] They wished instead to emulate the early apostolic community. The secular-mendicant controversy that began in the 1250s, as well, devoted a lot of space to arguing over the extent

[159] *Improbatio* 891 (383): "by human law, namely insofar as he planted the vine from which the wine was produced; and thus it was his (if it was proper to him) by reason of his own labour, whereby he acquired it—and not by an immediate bestowal of God." As John of Paris famously claimed in the *De regia potestate et papali* 3, in Bleienstein, *Johannes Quidort von Paris*, 82: "temporalia laicorum non sunt communitatis, … sed quilibet est dominus suae rei tamquam per suam industriam acquisitae…"; see also the fuller account in chapter seven (ibid., 96–98); discussed in Lambertini, *La povertà pensata*, 148–151. For John of Paris's theory of property, I am especially indebted to the articles of Coleman: "*Ratio* and *dominium*"; "*Dominium*"; "Two Jurisdictions"; and "Political Theory of John of Paris"; as well as Swanson, "Medieval Foundations."Apparently Raoul Ardens (d. *ca.* 1200) made a similar claim some hundred years earlier; see Couvreur, "Pauvreté et droits des pauvres," 24.

[160] *Improbatio* 874 (377–78): "Similiter, prima rerum diuisio post diluuium facta fuit immediate iure humano et non diuino, quoniam post diluuium Deus contulit dominium commune omnium inferiorum Noe et filiis eius et non diuisit inter eos dominia rerum, set ipsi postea et filii ipsorum diuiserunt inter se rerum dominia, unde *Genesis* ix capite [1–4]."

[161] *Improbatio* 878–879 (379).

[162] Miethke, "Paradiesischer Zustand," neatly surveyed many of the interesting developments in the Franciscan tradition. See also Potestà, "State of Innocence."

to which Christ and his apostles could be considered to be poor.[163] Thus it is not suprising that even the *Doctor Succinctus* had a lot to say on this topic.

Like all Franciscans, Francis believed that their founder, the *Christi signifer insignis*, had patterned his Rule after that of the lives of Christ and the apostles.[164] It is for this reason that mendicants hold better the place of apostles, that they "expressius et perfectius 'tenent figuram apostolorum'" than do monks.[165]

If the state of innocence was the foundation for the idea that lordship was a human invention that did not come about unmediatedly through divine law, then the situation of Christ and the apostles was meant to give historical reality to the idea that people could and did get by without owning any property—and that this was, in fact, an admirable thing to do. Of course, for this to make sense, one first had to show that Christ himself was poor, and not just poor in some vague sense (everyone agreed to that in one way or another), but that he was poor in the same way that the Franciscans claimed they were poor. This was a much more difficult task.

A lot of this has to do with whether Christ ever possessed some sort of temporal overlordship while on Earth.[166] According to Francis, Christ, insofar as he was a man, was neither lord nor king of temporal things.[167] Christ

[163] Cf. Miethke, "Paradiesischer Zustand," 529.

[164] *Improbatio* 358 (194): St Francis "uolens immediate fundare et directe suam religionem iuxta formam et modum uiuendi proprium Christi et apostolorum…." Of course, this idea, combined with the general approbation it received from various popes over the years, often leads to the boot-strapped argument that concludes that St Francis would not have imposed (nor the Church approved) a poverty more severe than that practiced by Christ and the apostles; and since the Franciscans hold no property individually or in common, nor possess any rights to the things that they use, it is clear that this would have been true for Christ and the apostles as well. Cf. *Improbatio* 360 (195), and 285–286 (163–64). It can even be taken further: if the apostles had to be at least as poor as the Franciscans, then Christ had to be at least as poor as the apostles, for as Jerome noted, "Non potuit dominus habere quod prohibuerat in seruis"; see *Improbatio* 1017–1018 (424–25); cf. 1000 (417). For Jerome, see *Epistulae* 22.19.6, in Hilberg, *Hieronymi epistulae I–LXX*, 170.

[165] *Improbatio* 373 (200), and 378 (202–03), probably quoting from C. 16 q. 1 c. 24.

[166] This is the subject of what Francis's editor, Nazareno Mariani, has designated the fifteenth chapter, the longest chapter of the *Improbatio*. Lambertini, "'Il mio regno'" is a useful entry point for this topic.

[167] At *Improbatio* 996–999 (416–17), Francis argued that there was papal sanction for this idea starting with Gregory IX in *Nimis prava* (X 5.31.17). This decretal claimed that the mendicants follow Christ in the highest poverty—which, Francis noted, could hardly be true if he retained lordship of a temporal kingdom. John had quoted this as well as Alexander IV's *Non sine multa* in *QQM* 177–196 (272–73), as Francis noted.

moreover made this clear to all through word and deed.[168] Attached to this claim was the corollary that, in the course of his life, he never acquired lordship or ownership of anything. It is this second claim, I think, that is more interesting for understanding Francis's theory.

Essentially, an argument against Christ having ever acquired property of his own has to be a series of arguments against specific scriptural passages which make it sound like he did have a few things after all. Christ, Francis maintained, assumed material poverty on our behalf just as he assumed mortality for us.[169] Thus, he had no home with respect to ownership and lordship as it is attested in Matthew 8:20 and Luke 9:58; this, furthermore, must be understood to be true *de iure*, not just *de facto*.[170]

The pope had also provided a long list of places where something was said to be Christ's (*eius*, *suus*, *cuius*).[171] Francis challenged this idea on the grounds that pronouns do not necessarily denote ideas of ownership. In a characteristic turn of phrase, he argued that it would follow by the same reason that the stars that appeared at his birth (Mt. 2:2) would have been Christ's with respect to ownership and lordship; or that we should say the same about "Christ's" cross (Io. 19:25), or "Paul's" chains (Col. 4:8). The whole idea, he concluded, was ridiculous.[172]

In regard to the classic objection that Christ had a purse, Francis stood by the classic Bonaventuran condescension defense.[173] The short answer, in Francis's words, was that "Christ took on the persona of the weak on the matter of the purse," as Augustine had said.[174] The argument is tortuous. John had suggested that to have ownership of a thing in common does not

[168] See, e.g., *Improbatio* 989 (413) and 429 (225), where *Exiit* is cited as the linchpin of this argument.

[169] *Improbatio* 1010 (421).

[170] *Improbatio* 987 (412). Francis actually used this statement to infer that Christ did not have, "quantum ad temporale dominium," "regnum seu imperium" since temporal lordship of a kingdom or empire includes temporal lordship of a *hospitium*—"sicut totum includit partem." It is left unstated, but Francis clearly meant mediate lordship, the sort exercised by kings over the affairs of their citizens.

[171] See, e.g., Mt. 17:2: "Eius uestimenta facta esse alba sicut nix" (Francis's phrasing). John is quoted at *Improbatio* 925–927 (392–93). Other passages cited are Mt. 3:11, 27:35; Mc. 1:7; and Io. 1:27, 13:4, 19:24.

[172] *Improbatio* 1031 (429–30).

[173] See above, p. 127, for references.

[174] *Improbatio* 367 (197). Francis noted three places where Augustine defended this idea: *Enarrationes in Psalmos* 103 sermo 3.11, in Dekkers and Fraipont, *Augustini ennarationes* 1509–10; *De opere monachorum* 5.6, in Zycha, *Augustini de fide et symbolo,* [*etc.*], 539–40; and an unidentified *Super Iohannem*.

detract from the perfection of the highest poverty "due to the type of performed work" (*ex genere operis operati*); and since Christ is known to have carried a purse, holding things in common cannot detract from this highest poverty.[175] But, Francis argued,

> Christus in loculis suscepit personam infirmorum.… Set—in eo quod pertinet ad perfectionem et ex genere operis, non derogat perfectioni—non cadit condescensio aliqua ad infirmos et imperfectos, quia condescendere infirmis et imperfectis est in aliquo opere ex genere operis imperfecto se conformare eis; ergo habere loculos in communi, ex genere operis operati, derogat perfectioni altissime paupertatis, licet ex parte operantis seu condescendentis fuerit maxime perfectionis quia fuit opus maxime misericordie et pietatis, secundum eundem Augustinum.[176]

Francis could have explained this more clearly. His point was that one could consider perfection and imperfection with respect to the deed itself, or with respect to the person performing the deed. Christ's action in this case is therefore both perfect and imperfect depending on the viewpoint. The condescension itself, as the action of having a common purse, does not belong of itself to perfection; but from the perspective of the agent, it is an example of perfection: it is an example of a great act of compassion and mercy. In Francis's terminology, when Christ took on the persona of the weak and imperfect, he did so in one of three ways: with respect to *dominium proprietatis*, *ministerium pietatis*, or *usus necessitatis*. But since the principle that condescension needs to detract from perfection *ex genere operis*, all these options lead to the conclusion that lordship of the purse would take away from the perfection of the highest poverty. The reason runs as follows:

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[175] The technical terminology is Francis's, not John's: *Improbatio* 367 (197). What John had argued was that Augustine could not have supposed that the apostles vowed to have nothing in common since his own Rule was founded on Acts 4:32, 35, which emphasized that all things were common; he concluded: "Cum igitur beatus Augustinus et eius fratres res habuerint et habeant in communi, non est reuocandum in dubium quin beatus Augustinus apostolos habuisse supposuerit in communi" (qtd. in 340 [187–88]). In all honesty, John was probably the one who read Augustine rightly. Crucial studies on this topic are: Lawless, *Monastic Rule*; Sanchis, "Pauvreté monastique"; Verheijen, *La règle* and *Augustine's Monasticism*; and Zumkeller, *Augustine's Rule*.

[176] *Improbatio* 367 (197–98): "Christ took up the persona of the weak on the matter of the purse.… But—in that which pertains to perfection, and does not take away from perfection on the basis of the type of work—some condescension does not fall to the weak and imperfect because condescending to weak and imperfect is to conform one's self to them in some work on the basis of an imperfect kind of work; therefore, to hold the purse in common, due to the kind of performed work, takes away from the perfection of the highest poverty, although, on the side of the one who works or condescends it would be of maximal perfection because, according to Augustine, it was a work of maximal mercy and piety."

If lordship of property itself is the condescension, the principle holds that it has to take away from perfection. If it is the ministry of piety, since the same principle would hold, then lordship of property would detract even more insofar as it redounds less to the advantage of others than it does to the ministry. And finally, if the use of the purse detracts from the highest perfection *ex genere operis*, then the lordship of the purse would detract even more from that perfection, for lordship of such things is less necessary *per se* than use is for human life.[177]

Naturally, it was not only Christ who lacked lordship of temporal things: he also commanded the apostles to do without lordship as well, both in common and individually.[178] According to Francis, the apostles vowed to follow Christ, which consists principally in preserving his precepts and counsels. And since this vow included leaving all behind, it is clear that they did so.[179] In fact, the goal or limit (*terminus siue limes*) of the apostolic profession was to relinquish every temporally concupiscible thing.[180] There are, of course, numerous scriptural passages which lend themselves to the Franciscan belief that the apostles were absolutely propertyless. Francis insisted that these passages were to be interpreted *simpliciter*, even though he was guilty at times of reading a scriptural passage via the Ordinary Gloss.[181]

To the standard objection that this vow of poverty might be more a mental than physical matter,[182] Francis gave a standard response: If Peter's words, "Ecce nos reliquimus omnia" (Mt. 19:27), are only to be understood "quantum ad affectionem et curam," then when Christ promised those who left home, field, brothers, or sisters on his behalf would receive a hundred times as much in this age and eternal life in the future (cf. Mt. 19:29; Mc. 10:29; Lc. 18:29–30), he more or less promised nothing:

> quia dicere quod *omnis qui reliquerit domos, aut agros*, quantum *ad affectionem et curam*, retinendo sibi proprietatem et dominium, *cencies tantum accipiet domos et agros in hoc tempore*, nichil esset penitus dictum, quia quoad

[177] *Improbatio* 368–370 (198–99). Francis may well have had in mind the distinctions Bonaventure made at *Ap. paup.* 1.9–10 (BOO 8:238a–39a).

[178] *Improbatio* 834 (364).

[179] *Improbatio* 326 (180). Without worrying overmuch about the issue of vows, we may note that Francis believed the apostles vowed *absolute* (327 [180]); and that one cannot, *simpliciter*, get rid of the *voluntas habendi* without a vow (328–329 [180–81]). Cf. 1023 (426).

[180] *Improbatio* 217 (135).

[181] On reading the passages *simpliciter*, see: *Improbatio* 274 (159); 443 (230); and 449 (233). For examples of using the gloss to prove his reading is the correct one, see: 198 (127) and 325 (179–80).

[182] E.g., *Improbatio* 188 (123). See p. 35 above for John's argument.

> quid deberet cencies tantum accipere in hoc tempore, ex quo sibi proprietatem et dominium retineret?[183]

After all, one can be unduly attached to, or concerned about, things that one can never obtain.[184] This is not to deny that evangelical poverty does not contain an "inner" component; but even if this inner disposition is more important, poverty requires the outer, material aspect—as is the case for chastity or obedience.[185] Indeed, when Peter says "secuti sumus te" (Mc. 10:28; Lc. 18:28), this should be understood with regard to a possible undertaking (*sequela*) of that work, not merely a "following of the heart." The same is true of the other half of the verse (*ecce nos dimisimus*): it cannot simply be a matter of mental approval of the sentiment, but it must rather be accompanied by real action. As he noted, the one necessarily follows from the other the way the completion of an effect follows from the completion of the cause.[186] The word Francis used was "burst forth" (*prorumpat*): not always, but sometimes virtue must burst forth into a proportionate and appropriate work. So too, with respect to the perfection of evangelical poverty, sometimes it must shine forth in an exterior expression (*habitu exteriori*) according to a corresponding interior disposition (*habitus interioris*).[187]

As I have already mentioned, the pope believed in the "communism" of the early community of believers; Acts 2:44 and 4:32–35 are pretty explicit on this point.[188] Franciscan apologists therefore had to deal with the issue of how this communism related to the apostles. The Michaelists argued that the community of apostles, the *collegium apostolorum*, was in fact a sort of "sub-community," within the early Church. As Francis explained it, the apostles' abdication of temporal goods in the general community of believers

[183] *Improbatio* 195 (126): "because to say that *everyone who will have left their homes or fields* with respect *to affection and care* while retaining for themselves ownership and lordship, *will receive homes and fields by the hundredfold at that time*, would be to have said absolutely nothing: for, with respect to what ought one receive a hundredfold at that time, when he retained for himself ownership and lordship?"

[184] *Improbatio* 197 (127).

[185] *Improbatio* 422 (222); for chastity, see 419–422 (221–22); for obedience, 426 (224). Francis cited X 3.35.6 in support of this idea; see 423 (223): "quia abdicatio proprietatis, sicut et custodia castitatis…."

[186] *Improbatio* 433 (226–27).

[187] *Improbatio* 436 (228).

[188] See p. 156 n. 175, above.

was not higher or more perfect with Christ outside of that community.[189] However,

> apostoli in communitate generali omnium credencium non possederunt, quoad proprietatem et dominium, aliquid in speciali nec in communi quoad communitatem ipsorum specialem et propriam, quia illud, quodcunque fuisset, non fuisset commune toti multitudini credencium, sicut quod est proprium communitatis specialis non potest esse commune toti communitati generaliori, quia proprium partis non est commune toti.[190]

The principle of the argument is clear: something that is exclusive or proper (*proprium*) to a part cannot be common to the whole. Therefore, the apostles, as a particular community must not have had any *proprietas* or *dominium* proper to their community: for, if they had had any, it could not have been common to the whole multitude of believers. In turn, this would mean that the description of the early community of believers in Acts would not be accurate.

Francis's account of the apostolic sub-community leaves much to be desired. This community stood in relation to the larger multitude of believers in the same way that an individual believer was related to the larger multitude. And the *raison d'être* for the sub-community to hold the place of one person was only because the abdication of ownership individually and in common is more perfect than an abdication made only in terms of individual property.[191] (To be fair, it is important to remember that Francis believed the apostles' abdication of ownership had already been established

[189] Francis's point here may seem ambiguous; what he is saying is that the apostles' abdication while they were with Christ and "extra illam [generalem] communitatem" was not greater than their abdication inside of—i.e., as members of—that general community.

[190] *Improbatio* 281 (162): "the apostles in the general community of all believers did not possess anything individually or in common with respect to ownership and lordship in terms of their particular and exclusive community, because that thing, whatever it would be, would not be common to the whole multitude of believers: just as what is exclusive to a particular community cannot be common to the whole, more general community because something exclusive to a part is not common to the whole."

[191] *Improbatio* 283 (163): "Item, communitas apostolorum in illa multitudine credencium, quoad abdicationem proprietatis, tenuit locum unius persone specialis seu singularis quia, sicut nulla persona specialis retinuit sibi aliquam proprietatem in speciali in illa multitudine, ita nec tota communitas apostolorum propria retinuit sibi aliquam proprietatem in illa multitudine credencium; communitas apostolorum non retinuit, quoad abdicationem proprietatis, locum unius persone specialis in illa multitudine nisi quia abdicatio proprietatis in speciali et in communi, quacunque communitate speciali citra communitatem generalem totius Ecclesie, cuius tipum et figuram gerebat illa Ecclesia primitiua, est perfectior et maioris excellencie quam abdicatio proprietatis omnium tantum in speciali et non in communi."

in Michael's appeals, though in the *Improbatio*, the real arguments for this come a little later on.[192])

In other words, Francis seems to have missed entirely the reason normally posited for the apostolic sub-community—or at the very least a response to the pope's claim that an order, and by implication a sub-community within the Church, was not a real entity (which could have *usus facti*). Francis was well aware of John's objection,[193] but when he came back to explaining the nature of a "communitas specialis," he simply re-iterated that it "se habet ad communitatem generalem sicut se habet una persona singularis ad unam communitatem specialem."[194]

What set the apostles apart from other believers was that they lived by a different *regula*.[195] Like Michael, Francis also favoured a three-tiered ecclesiology of the early Church, which distinguished between general believers, the seventy-two disciples, and the true apostles. There were significant differences, however, particularly in terms of their level of poverty. Believers, who are called "discipuli Christi generaliter," were not forbidden from having individual riches and temporal things just as many good Christians have many temporal goods. Francis numbered Joseph of Arimathea among this group.[196] A second group were the "discipuli Christi specialiter," to whom Christ entrusted the power of preaching and caring for the weak. These people were forbidden from carrying the sack, purse, and shoes (Lc. 10:4); nor do we read that they had any riches, or ownership or lordship of any temporal thing after they became disciples.[197] These two orders account for the list John had provided of examples of disciples who seem to have had possession of temporal goods: it was simply a matter of the pope confusing which order the individual in question actually belonged to.[198] The third group was the order of apostles themselves: those whom Christ specially chose. Inseparable companions and continuous tablemates of Christ, they

[192] In particular, *Improbatio* 363–364 (196–97) and 439–442 (229–30).

[193] *Improbatio* 718 (328–29). For a discussion of John's position, see p. 52 above. This forms the subject of chapter seven.

[194] *Improbatio* 743 (335): "a particular community is related to a general community in the same way an individual person is related to a particular community."

[195] *Improbatio* 348 (190). See *Improbatio* 349–352 (191) for a short list of the differences; cf. 1083 (442).

[196] *Improbatio* 1077 (439–40).

[197] *Improbatio* 1078 (440).

[198] *Improbatio* 1080–1081 (441).

lived by the same law (*lex*) of expropriation and abdication.[199] This was true before they were sent to preach,[200] and remained true upon their return.[201]

It is clear that Francis's position differed from Michael's in that we cannot map these three groups of "disciples" onto the state of the various *religiones* of fourteenth-century Europe.[202] The level of poverty Francis described instead corresponds to laymen, religious who hold things in common, and the Franciscans. This seems different from Michael's desire to link the situation of the primitive Church to the Church of his own day. In fact, Francis could not even be sure whether Peter's "Ecce nos dimisimus omnia" (Lc. 18:28) applied to any disciples other than the apostles.[203] Since Francis also insisted that the primitive Church held things in common, his three-fold account of Christ's disciples seems rather paradoxical.

## 4. *William of Ockham*

Early on in the *Opus nonaginta dierum*, Ockham outlined several different senses of *dominium*.[204] After giving some of the ways the word is used in the non-legal sciences, he noted that, as the word is taken *in iure*, there are only two basic types of *dominium*: divine and human.[205]

### 4.1. *Dominium diuinum*

This distinction explains why Ockham was unconcerned with specifying the nature of divine *dominium*, for neither the source nor extent of divine lordship was an issue for Ockham.[206] For instance, Ockham never discussed whether the lordship which Adam and, after her creation, Eve exercised in Eden was divinely instituted or not. It was, of course, but who would doubt it? The only important questions were: what did this lordship mean

[199] *Improbatio* 1082 (442).

[200] *Improbatio* 1085 (442–43); but the lengthy proof is carried out in 1086–1120 (443–55).

[201] *Improbatio* 1121 (457); the proof takes up the rest of the chapter (1122–1171 [457–76]).

[202] It might be useful to compare Table 4.1 on p. 145, above, with Francis's earlier attempts to relate degrees of expropriation and modes of life in his commentary on the *Sentences*, as described in Lambertini, "A proposito del IV libro," 18–24, especially the table on 22.

[203] *Improbatio* 1083 (442): "In persona autem aliorum discipulorum ad predicandum missorum, utrum Petrus prefata uerba dixerit an non, certum ex scriptura non habetur, nec faciliter posset altera pars conuinci."

[204] See Gray, "Ockham on Trusts," 153–57, for a concise account of the various meanings of *dominium* in the *OND*.

[205] *OND* 2.262–318 (1:304–06).

[206] Cf. Morrall, "Some Notes," 348–49.

for them? in what sense were they the *domini*? and over what exactly did they exercise lordship (*dominari*)? But questions like these are properly considered questions of "human lordship."[207]

### 4.2. *Dominium humanum*

Human lordship is much more complicated. Ockham described two basic types: the *dominium* which was introduced by unmediated divine ordination, and that which positive law or human institution introduced. Divinely instituted lordship is a historical category. Under the Old Law, various distinct *dominia* were introduced by unmediated divine ordination. (With the promulgation of the Gospel such lordship has ceased to be introduced in this way.[208]) When lordship is divinely instituted, it is possible for the nature of *dominium* to change. Although one might want to trace this doctrine back to Ockham's famous account of God's *potentia absoluta/ordinata*,[209] it is easy enough to imagine that the principle is no more complicated than what Ockham said about privileges: the granter of a privilege may arbitrarily set and revoke the conditions at whim.[210] This is most clear in Ockham's account of Adam's (and Eve's) prelapsarian lordship.[211]

Adam and Eve's lordship is historically unique, and not surprisingly rather complicated. Part of the reason for this is due to the pope's account of this period, in which he tried to show that exclusive lordship (*dominium proprium*) was instituted by God before the Fall.[212] Ockham did not deny the divine origins of this lordship, but he took issue with the designation "exclusive." One cannot argue, he maintained, from the fact that there is only one lord to the conclusion that that lordship is really exclusive. As an

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[207] In like manner, when Ockham argued that Christ *qua* wayfaring man, and *qua* mortal man, never had (nor acquired) exclusive lordship, he meant human lordship in the same sense (therefore he also never had nor renounced a temporal kingship). Of course, he was "inquantum Deus … rex omnium," but he ruled spiritually, and was only called lord *antonomastice* because of the union of human and divine natures; in the few cases where he had to act like a king, he did so *qua* God. All of this is discussed in *OND* 93.166–1111 (2:674–98); 94.30–123 (2:706–08); 95.40–111 (2:716–18); and 96.213–238 (2:734–35).

[208] *OND* 88.142–222 (2:657–59); cf. 91.99–114 (2:668).

[209] For a brief account of how Ockham understood this power, see Maurer, *Philosophy of Ockham*, 254–65. For its significance in Ockham's confrontation with John XXII, see Randi, "Absolute Power of God."

[210] Cf. Tierney, "Natural Law and Canon Law," 4.

[211] On what follows, see also Miethke, "Power of Rulers," 213–14.

[212] In John's opinion, Adam became a property holder as soon as he began to use things; see above, p. 45.

example, Ockham suggested the situation of a solitary monk in a monastery. Simply put, does it make sense to say that one monk, simply because he is the only monk left alive after a raid or a plague, has sole lordship over the monastery's resources? If so, what happens when another monk joins? Does the first monk have to perform a specific action to relinquish sole lordship (which he should not have in the first place)? The fact that the answer to the last question is "no" shows that the answer to the first question must be "no" as well.[213]

This, Ockham claimed, is particularly true in the special circumstances of Adam: "Quia dominium rerum, quod absque omni donatione, vendicatione et alia humana ordinatione, qua rei dominium transfertur in aliquem, et actu et morte illius potest ad alium pervenire, non est proprium alicui."[214] Since, he continued, this is what happened when Eve was created, Adam could never have granted her lordship in the state of innocence. Instead, anyone would simply take and use things as needed. Ockham's rationale for this claim was simple: Adam, like everyone else, should not be deprived of his things without cause or fault; but when Eve was made, she would necessarily share in his lordship, which would mean he would lose his exclusive lordship; therefore, whatever lordship he might have had before Eve was formed, it was not exclusive.[215] Furthermore, it is more appropriate to call Edenic (so to speak) lordship 'common' since this often means that it is to be shared.[216]

It is easy to believe that the circumstances surrounding Adam and Eve's lordship had to be historically unique, but was the nature of their lordship substantively different from the varieties of *dominium* that might be found throughout the rest of history? The pope seemed to think not, but the *Opus nonaginta dierum* paints a very different picture. Edenic lordship over all temporal things was a "potestas rationabiliter regendi et gubernandi temporalia absque eorum resistentia violenta, ita quod homini violentiam vel nocumentum inferre non poterant."[217] At first glance, it would seem that this

[213] *OND* 27.55–70 (2:487), and *OND* 88.331–335 (2:661–62); cf. *Brev.* 3.15.45–66 (4:191–92). See also the discussion in Miethke, *Ockhams Weg*, 513–15.

[214] *OND* 27.74–84 (2:487–88): "For, a lordship of things is not proper to anyone, which can pass over to another without any donation, sale, or other human ordination whereby the lordship of a thing is transferred to someone, or without his act or death."

[215] *OND* 27.85–94 (2:488).

[216] *OND* 27.143–149 (2:489), citing *Glos. ord.* ad D. 1 c. 7, s.v. "communis omnium."

[217] *OND* 14.75–77 (2:432): "a power of ruling and directing temporally things reasonably without their violent resistance in such a way that they could not inflict violence or harm on [another] person." Ockham offerred an analogy (14.127–156 [2:433–34]), which somewhat elucidates what he meant by this "potestas ad libitum disponendi de temporalibus" (for

lordship only concerned ruling and managing things, not using them, but Ockham caught this possible omission and explicitly said that in the state of innocence, the act of using was not separate for consumables, only from any lordship found among mortals (*quod inter mortales est inventum*).[218]

Nevertheless, Ockham still tried to maintain that, at some level, the distinction between use and lordship existed in the state of nature. For, in addition to this perfect power of ruling, Ockham also argued that Adam and Eve were also given a power to use various specific things (*potestas utendi quibusdam rebus determinatis*). That is, they could use most things in paradise, but there was one thing which was wholly forbidden. It is not surprising that Ockham posited the existence of two distinct powers. For, aside from the fact that he had to account specifically for the tree our first parents were not allowed to use, the distinct powers are meant to cover two different aspects of nature over which Adam and Eve exercised control: the power of ruling existed for dealing with the animals of nature, while the power of using had to do with both fauna and flora. After all, one does not *regere* over the grains of the world.

Much more common among human *dominia* are those established by positive, or civil, law. This was possible only after the Fall, for sin provided the occasion for the appropriation of things[219] and acquiring common (civil) lordship.[220] Acquiring lordship for Ockham is naturally connected to the will. Michael noted the Roman law precedent for this idea, but Ockham chose not to make use of it, perhaps another little sign that he was less at ease with Roman law than canon law. Alternatively, it is not a stretch to imagine that Ockham felt the importance of willing for the acquisition of lordship was well-known enough to not need any justification.

Following Francis, Ockham suggested that the first example of any lordship being established by human law probably occurred in the time of Cain and Abel (Gen. 4:2–5), where each made individual offerings.[221] However,

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non-moral sitations at least): i.e., that of a servant or boy who is able to rule his lord's horse "ad suae placitum voluntatis, et … cui resisti non potest."

[218] *OND* 14.216–219 (2:435). That is, any positive law lordship; see *OND* 14.92–106 (2:432).

[219] This is more significant than it might seem, for the Franciscan *Rule* is predicated upon the idea that a Franciscan must not appropriate things to himself; see *Regula bullata* 6.1 (231).

[220] Although this was in a sense a new power, at one point the *OND* seems to suggest that the power would have devolved naturally upon humankind by virtue of being out in the wide empty world: "quia quae in nullius bonis sunt, occupanti conceduntur" (*OND* 14.188–192 [2:435]). This is of course a well-know Roman law maxim, which Ockham had already alluded to earlier (4.209–210 [333]).

[221] *OND* 88.97–108 (2:656).

in response to a possible objection, Ockham conceded that it was possible that Adam and Eve made the first division into *dominia propria* when they made girdles for themselves (Gen. 3:7), for this would have been done "not by a special divine command, but by human will." (*non ex speciali praecepto divino, sed voluntate humana*).[222]

The key to all of this is that God did not then give humankind property directly, but simply allowed people who so desired to appropriate property.[223] Human lordship was established by human, later civil, law. This type of lordship, moreover, comes in two flavours. The most common meaning of *dominium* in this context is that it is a "potestas humana principalis vendicandi et defendendi in humano iudicio rem aliquam temporalem."[224] "Human power" makes it plain we are not talking about God's lordship; "principal" specifies that the power is to be distinguished from the power of claiming or defending a thing which derives from other relations, such as usufruct;[225] finally, the phrase "in a human court" shows how it is different from a grace or licence.[226] This type of lordship is specified by several different adjectives. The most common is *civile et mundanum*, but it is sometimes called *plenum* or *liberum et absolutum*.[227] But this definition has a stricter sense: it includes all the characteristics of the first definition, but adds that it is also a power "[res] omni modo, qui non est a iure naturali prohibitus, pertractandi."[228] Put another way, the second type of lordship includes the power of the first, but has added the power of ordering the thing freely.[229] Thus the priests today and Levites of days past had lordship in the first sense, but not so in

[222] *OND* 88.133 (2:657). In the immediately preceding lines, Ockham doubts that this was the case because of their marriage bond and mutual love; for a fuller discussion, see 88.109–124 (2:656–57) and 88.258–268 (2:660).

[223] Miethke, "Power of Rulers," 214; in "*Dominium*, *ius* und *lex*," 250–51, he referred to a "potestas acquirendi dominium."

[224] *OND* 2.320–321 (1:306): "a principal human power of claiming and defending some temporal thing in a human court." Cf. 77.87–99 (2:626), for the point that *verum dominium* includes this power, but that the Church's full lordship is not as full as a layman's. See also Miethke, *Ockhams Weg*, 458–60.

[225] Later he qualified this: "quamvis non semper principalissima" (20.54–55 [2:460]). Ockham thus recognized the "absolute" nature of *dominium* described by Birks (above, p. 122), but also recognized that it was not, strictly speaking, absolutely absolute.

[226] *OND* 2.322–337 (1:306).

[227] *OND* 4.296–299 (1:336).

[228] *OND* 2.389–397 (1:308): "a power of treating [things] in any way that is not forbidden by natural law." Cf. 4.295–306 (1:336); 77.407–438 (2:633–34). See also Kölmel, "Das Naturrecht," 44.

[229] *OND* 20.53–57 (2:460).

the second sense.[230] It is a limited or restricted type of lordship. Ultimately, though a cleric does not have the "full" lordship of a layman, the lordship they exercise must be considered true (*verum*) lordship, much like the fact that the lordship the Roman Church has over the goods which the Franciscans use is real lordship.[231] Ockham's discussion here is clearly indebted to Michael's account of the temporal lordship that arises from the fourth *communitas*, which is grounded in the *ius ecclesiasticum*, although Ockham refrained from utilizing Michael's terminology.[232]

Almost all discussion of *dominium* in the *Opus nonaginta dierum* turns on the unrestricted type of "civile et mundanum" lordship, for Ockham insisted that the pope's understanding of lordship was limited to this type alone.[233] The reason for this insistence is obvious enough insofar as the Michaelists wished only to prove that neither Adam and Eve nor Christ and the Apostles ever had this kind of lordship, either in common or individually. In turn, this would allow the Franciscans to dispense with a need to have it too.

### 4.3. Dominium *and the Early Community of Believers*

A basic premise of Franciscan poverty is that the apostles, when they became apostles, voluntarily undertook a life of real poverty exemplified by the practice of Christ, who always practiced what he preached. Since whatever Christ counselled was something that he taught,[234] and he carried out in deed what he taught in word, it is clear that he must have lived the life of poverty he counselled.[235]

The apostles also lived in poverty due to their vow to that effect. The advice Christ gave the youth in Matthew 19:21—*Si vis perfectus esse, vade, et vende omnia quae habes, et da pauperibus*—was given to the apostles as well, "sub praecepto vel consilio," just as Matthew 19:27 represented Peter's claim on behalf of the apostles of their fulfilment of this precept or counsel. The apostles, after all, fulfilled all of his precepts and counsels,[236] and it seems as though Christ gave pride of place to the counsels of poverty, chastity, and

[230] *OND* 20.57–84 (2:460); cf. 4.300–301 (1:336).

[231] *OND* 77.87–102 (2:626); cf. 2.399–402 (1:308).

[232] See above, p. 143. *Impug.* § 16 (249) gives a slightly different version of ecclesiastical lordship: the priests do not have *proprietas*, and therefore cannot exercise the normal features of civil lordship, but they do have a right of using *iure positivo divino*; cf. also *Impug.* § 11 (247).

[233] *OND* 4.99–103 (1:331).

[234] *OND* 11.314–315 (2:414): "Quicquid Christus consuluit, ipse docuit."

[235] *OND* 94.75–81 (2:707).

[236] *OND* 11.82–96 (2:408–09); cf. 11.312–342 (2:414).

obedience insofar as they are especially useful for converting people to the Christian faith.[237] Hence Augustine's point that the apostles vowed this vow of poverty *potentissime*.[238]

The reason for the vow is straightforward. Even if some anxiety about temporal goods remains after the vow has been made, the vow must yet contribute something to perfection, otherwise the same accusation could be levelled against the vow of obedience if—"sicut saepe accidit"—one ends up no more obedient after the vow than before.[239] It is not only licit, but useful for Christians to vow to neither do nor have those things which involve them in sin: rather, it is better to flee opportunities for sin.[240] It is, in short, more perfect and more pleasing to God to vow to follow Christ than to follow him without a vow.[241]

The content of the apostles' vow was the renunciation of ownership and lordship of all temporal things, both individually and in common. Since Luke 9:62 explains that those fit for God's kingdom do not look back after putting hand to plow, this means that Matthew 19:27 must be understood as a vow that remained in force ever afterwards.[242] In fact, those who have perfectly relinquished something cannot even regain (*resumere*) the will to have it. This is what it means to vow to not have something.[243] The proof that the apostles vowed to not have anything in common is less forcefully upheld. Ockham based his conclusion on the fact that this is what the Franciscans have vowed to do and that their vow cannot "exceed" the apostolic vow on which it is based.[244]

The vow of poverty included everthing in its scope, from the estates in Judea to the necessities of life. Regarding the estates, John was wrong to suggest that the apostles had any (in Judea or elsewhere), and to think that they ever acquired any later on.[245] As evidence that the apostle's vow also in-

[237] *OND* 17.182–185 (2:448).

[238] *OND* 17.126–129 (2:447).

[239] *OND* 76.647–666 (2:621).

[240] *OND* 114.100–106 (2:801). Ockham added that it was probably not good for the *tota communitas* to make vows of this sort.

[241] *OND* 17.161–168 (2:448). Studies of Ockham's political thought would benefit from squaring the role of the will in political and ethical action with his belief that vowing to be under another person's control is itself praiseworthy.

[242] *OND* 17.52–65 (2:445).

[243] *OND* 17.74–86 (2:446).

[244] *OND* 17.110–124 (2:446–47); 23.26–30 (2:469). A similar argument was made regarding traditional monastic vows of poverty and the apostles' vow to renounce all individual ownership; see, e.g., *OND* 17.66–73 (2:445).

[245] *OND* 5.46–200 (1:346–50).

cluded necessities, Ockham turned first to the Benedictine and Augustinian Rules. Ockham noted that Benedict insisted that a monk had nothing under his own control, including both material things like clothing and his own will, while Augustine insisted on common ownership of things like clothes.[246] Ockham then built upon Benedict's point about a monk not being *in propria potestate*. This is the very reason a slave possesses nothing, and the same logic thus applies to people in religious orders.[247] The opposite of this position is, moreover, untenable. For if the vow of living without anything of one's own did not extend to necessities, then monks and other religious would have individual ownership and lordship of things like bread, wine, and clothing. In turn, as Michael had argued, this would mean that their superior would not be able to decree what is to be done with these things; instead the individuals would be able to decide what they want to do with them, including selling them for money.[248]

Ockham also took issue with the pope's claim that he abandoned everything only with respect to an inner disposition (*cura et affectio*). Ockham, like any good internalist, insisted that the interior act was what determined the goodness or badness of an external act: "opus exterius non sit bonum vel malum, nisi propter actum interiorem."[249] He thus agreed that one's mental disposition was a crucial feature of apostolic poverty, though he qualified the pope's more generic claims about *affectio*.

The basic questions that needed answering were what kind of affection was left behind, and how much of it. Ockham suggested three possibilities: (1) the Franciscans might have left *all* affection, both necessary and non-necessary; or (2) they left all everything with respect to all non-necessary affection; or (3) they left behind everything with respect to (only) some non-necessary affection. The first option is impossible, since human life requires temporal things and thus requires at least some affection for temporal things. The third option does not work either, for it contradicts Peter's claim in Matthew 19:27. It is clear, then, that when Peter claimed the apostles had left everthing behind, he meant that they left behind all affection for non-necessary things.[250] The apostles even abandoned the will to have things.

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[246] *OND* 9.615–642 (2:396).

[247] *OND* 9.649–665 (2:397).

[248] *OND* 9.666–687 (2:398–99).

[249] *OND* 76.616–616 (2:620): "an external act is not good or bad except on account of the interior act." This is a topic that is dealt with more fully on p. 219 below.

[250] *OND* 12.65–80 (2:425); cf. 12.111–125 (2:426). A similar argument is given about *cura* at 12.81–99 (2:425–26).

When, for example, Peter and Andrew abandoned their nets (Mt. 4:20; Mc. 1:18), they also abandoned the will to have them, and one who abandons the will to have something also abandons ownership and lordship of it.[251] This abandonment, moreover, must include the intention of not re-acquiring the possessions that they left behind.[252]

However, he insisted that the interior disposition cannot be all there is to the apostles' poverty. As the last example suggests, actual abandonment of lordship and ownership must also take place. It is, in fact, more perfect to do both the interior and exterior act. (Otherwise religious would have abandoned all lordship and ownership in vain.[253]) Ockham elected to make his point by quoting Aquinas at length, and not without a certain degree of gloating.[254] Aquinas wrote against the idea that the poverty described in Scripture was not *actualis*, but merely *habitualis*.[255] Ockham drew eight conclusions from Aquinas. The second was that an abdication of ownership was more perfect when it involved more than solely a mental or volitional abdication. The third was that the abdication of ownership pertains to evangelical poverty, and that evangelical poverty was also actual poverty; the sixth was that this type of poverty was preferable to merely habitual poverty; and the fourth, fifth, and seventh were that Christ and the apostles experienced this type of actual poverty.[256]

The abdication of temporal goods thus described obviously refers only to the individual abandonment of goods; the argument could be made (and indeed often was) that Acts 2:44–45 and 4:32–35 showed that the apostles still retained common lordship of temporal goods. Ockham therefore devoted a fair amount of space to the question of whether the apostles constituted some sort of sub-community within the early church, and whether it exercised any sort of common (civil) lordship over the goods of the church. Ockham chose to follow Francis's version of the three groups of the early Church. Besides the apostles, there were also those specially deputized to

[251] *OND* 12.51–64 (2:424–25).

[252] *OND* 11.97–126 (2:409).

[253] *OND* 12.25–31 (2:424).

[254] *OND* 23.157–159 (2:472): "Insuper isti impugnatores propter eos, qui doctrinam Thomae sequntur, verba eiusdem praedictam assertionem tanquam erroneam reprobantis adducunt." See p. 317 n. 117 for further references. In this context, Ockham admits to inserting some of Aquinas's words on the *impugnatores*' behalf: "Et ideo dictarum seriem rationum duxi praesentibus inserendam" (23.199–200 [2:473]).

[255] *OND* 23.180–189 (2:472–73). In this chapter, Ockham quoted from *Contra impugnantes Dei cultum et religionem* 6.1–3, in Aquinas, *Opera omnia*, 41A:94–99.

[256] *OND* 23.328–352 (2:476–77).

preach the faith of Christ (cf. Lc. 10:1–16). The third group were simply those who had converted to the faith but had not taken up the duty of preaching. Both the first and second groups did not have any temporal things as far as lordship or ownership is concerned, while the members of the third could have things if they were so inclined.[257] Additionally, the apostles were in fact held to a stricter standard than even the second group insofar as Christ imposed certain restrictions upon them—e.g., to not possess gold, silver, or money, to not wear shoes, or take two coats (cf. Mt. 10.9–10)—which he did not impose upon others.[258]

Yet Ockham was unwilling to commit (*concedunt aliqui*) entirely to either Michael's or Francis's position regarding how the three groups were related. He did insist that Christ gave at least two *leges uiuendi*, but he thought that there might be some overlap between how all these "disciples" lived. He was certain that the apostles lived a different life from the regular life of all Christians, but he conceded that some of the seventy-two disciples and perhaps even other Christians might have lived the same life as the apostles.[259]

Regarding the problem of the apostolic sub-community, Ockham maintained that the apostles, as a group, did not have any sort of common civil lordship.[260] Thus, when John XXII noted that after the apostles returned from their preaching mission they "had" bread, fish, and money, not to mention St Peter's famous two swords,[261] William's solution was to point out that *habere* had many senses other than a proprietary one. The apostles, moreover, had vowed and observed perfection in the form of evangelical poverty for all time.[262] And so it was in these other senses that the apostles had things.[263] The apostles had the bread and fish, therefore, only with

[257] *OND* 100.93–104 (2:750). The additional point that the third group could renounce property rights if they wished goes a long way towards correcting the deficiencies of the accounts of Michael and Francis.

[258] *OND* 100.60–91 (2:549–50). Presumably Ockham was thinking of *possessio* in its legal sense, namely as both the physical control of a thing and the intention to hold it under physical control, not as merely the physical holding of a thing.

[259] *OND* 101.125–128 (2:751).

[260] *OND* 4.323–325 (1:336); the case is made later on: 23.356–403 (2:477–78) and 6.89–123 (1:357–58).

[261] *OND* 103.1–32 (2:764–65).

[262] *OND* 102.51–65 (2:755). The proof for this vow derives from a quotation of (Ps.-)Augustine, *De mirabilibus sacrae scripturae* 3.16, in Migne, *Patrologia latina* 35:2200–01, which had become commonplace in Franciscan apologetical circles; see, e.g., *Ap. paup.* 7.12 (BOO 8:276a).

[263] *OND* 11.654–666 (2:422–23); cf. 109.62–64 (2:785). Ockham may well have had in mind

respect to a licit power of using and some sort of dispensation (*aliqualis dispensatio*) from the granters' will. The lordship of some things belonged to, for example, the women who ministered to them from their own resources (Lc. 8:3). As for the money or the two swords, Ockham argued that it cannot be shown that they were ever held in terms of lordship or ownership, and indeed in certain cases it may well have been a situation of necessity. Ultimately, although it often cannot be proven one way or another whether someone had lordship or ownership of a certain thing when the passage in question is considered in isolation from all other contexts, when other pertinent passages are read and compared, it becomes quite clear that the apostles did not have ownership and lordship of any thing after they were appointed to the apostolate.[264]

Rather, things which were common to the community of believers, were also common to the apostles. That is, the sub-community as such did not have any property rights.[265] To the question of who owned the goods of the community, Ockham believed there were three equally viable alternatives: (1) Although the goods belonged to that community in some way, they belonged particularly (*specialiter*) to God's lordship. They were not, in other words, *res nullius*. This would entail that neither the apostles nor anyone else would be able to litigate in court for these goods in their own name (and, consequently, be somewhat similar to the system of lordship connected with the goods the Franciscans use insofar as they both would only have simple use of fact). Alternatively, (2) it might be that they collectively had some kind of legally enforceable lordship in that someone could litigate for the goods in the name of the whole community. On this view, the apostles would still have only simple use of fact, and their college or sub-community would still lack any sort of lordship specific to that group, but they would share in the right(s) that the whole community of believers all had since these goods were given for the advantage of all believers. The management of such goods, however, would reside with the prelates of the Church (*qua* prelates). Finally, (3) it might have been the case that the common goods mentioned in Acts were common to the apostles in terms of a licit power to relieve their needs from these goods, in accordance with their ordination. Legally enforceable lordship, however, was common only (*solummodo*) to the believers who had

Aristotle, *Categoriae* 15.15b17–32, in Minio-Paluello, *Categoriae*, 40–41, 78–79, 117. See also Baudry, *Lexique philosophique*, 106–07.

[264] *OND* 103.76–179 (2:766–68).

[265] *OND* 106.42–58 (2:771); cf. 6.465–506 (1:366–67). This is discussed at greater length on p. 277, below.

not vowed the renunciation of all lordship. Thus again, the apostles would have had no lordship, but only simple use of fact.[266] It seems reasonable to assume that Ockham privately favoured the second option, but as he was only interested at this point in proving that the apostles did not have any civil lordship of temporal goods, not precisely who had the lordship, he did not make this argument explicitly. Elsewhere, however, he explained that the apostles could only correct fraternally, never litigate in court.[267]

The lordship exercised by the early Church, however, was not simply generic civil lordship. In Ockham's terminology, it was not "full and free" in the way it was before they became converts. This is clear insofar as once the goods were given to the community, they could no longer be sold or transferred at will, but only for the sustenance of one or another of the members;[268] in short, they had restricted ownership—which is not to say that the early community had no ownership whatsoever. Therefore, to the pope's point that the community had no ownership *in communi* expressly contradicts Scripture,[269] Ockham argued that it was not a question of whether the ownership was individual or common, but rather of what kind of ownership. If we are speaking of the most common meaning of the term (full and free ownership), which allows the owner (*proprietarius*), whether one person or a community, to freely manage, sell, give, bequeath, alienate, use, and consume the thing at will (*ad suae libitum voluntatis*), neither the clergy nor the religious have this kind of ownership. For the cleric's part, the goods of the church may only be used in certain ways and for certain things; and the religious simply do not have such ownership, either common or individual, of temporal things. This only qualifies as lordship in the looser sense.[270] Similarly, then, when Michael claimed that the early community did not have ownership, he meant precisely this type of ownership. The second type of ownership is much more limited, but also applies to individuals and to groups. This type of ownership gives the owner the power to claim the thing in court, but does not include the power of freely managing, selling, giving, bequeathing, alienating, or using the thing. This is the ownership the early

[266] *OND* 106.66–114 (2:772–73).

[267] *OND* 111.13–29 (2:793). For Ockham's views on fraternal correction, see Shogimen, "Disobedience to Toleration," and now *Ockham and Political Discourse*, 105–23.

[268] *OND* 4.342–384 (1:337–38). Prior to this, a person could do what he liked with his property (4.406–443 [1:338–39]).

[269] See *QVR*, 556–57.

[270] See above, p. 165.

community had in common, for there were several restrictions upon how they could use these common goods.[271]

An understanding of Michaelist poverty clearly requires an understanding of how lordship worked in the state of innocence and in the primitive Church. The first thing the Michaelists did was to distinguish the various types of lordship. They did not doubt that John knew that *dominium* had many meanings, but they insisted that he had to phrase his question in terms of human lordship. Human lordship, at least in its modern form, did not exist before the Fall. There was no property as such back then. If we can phrase the Michaelist theory in terms they never used, a useful way of thinking about this is to put this claim in the context of positive and negative communities.[272] The Michaelists maintained that before the Fall humans lived in a positive community: resources were common to all, and no one could be excluded from using anything. This is the regime that existed under natural law. But things changed with the Fall. Suddenly there was the will to appropriate, and natural law allowed for appropriation beyond cases of extreme need; with time human positive law grew up, which treated the resources of the earth as a negative community where unowned things are merely *res nullius*. Now original acquisition took place, although it still did not necessarily injure or diminish other people's rights per se. Another key to the Michaelist position was that positive human law is not strictly necessary. One of the many remarkable things that Christ did was to show that it was entirely possible to renounce property relationships based on positive law while at the same time respecting them. Although one could 'opt out' of property ownership, one was still bound to respect the institution in daily life unless in dire need.

There were differences as well in the Michaelist account of *dominium*. The most glaring in my opinion was how each (excluding Bonagratia) described the early Church. Michael and Francis each broke the Church into three different groups, but accounted for their poverty in slightly different ways. When Ockham came to write his tract he was forced, if he perceived the difference, to choose between the two. He opted to follow Francis on this point, perhaps because Francis's account was much easier to follow. (Michael's, after all, was split over two different texts, which each answered different

[271] *OND* 4.545–574 (1:342–43). At this point, Ockham was unwilling to commit to whether or not the common ownership was shared by the apostles and the rest of the community. Cf. 2.338–388 (1:306–08), where it is claimed on the basis of several "sacred canons" that ecclesiastics must have lordship in the general meaning of the term (*communiter accepto*).

[272] See above, p. 80.

bulls of John, so it may be that it was hard to perceived how Michael's position differed from Francis's.) However, Ockham modified Francis's position some by arguing that the general believers could keep property or choose poverty as they saw fit; in doing so, he thereby bridged the gap between Francis and Michael.

CHAPTER FIVE

# THE SPECIES OF USUS

So far we have examined in some detail what the Michaelists meant by *ius* and *dominium*. The third term, *usus*, was no less important a term in the Franciscan defense of poverty. Franciscans themselves disagreed about what kind of *usus* a Franciscan was to have. In the second half of the thirteenth century one of the bigger debates about what form of poverty Franciscans vowed themselves had to do with *usus pauper*. This controversy arose in the wake of *Exiit*, and continued to rage through the so-called Clementine Settlement as laid down in *Exivi*, and in some ways even eluded the combined efforts of Bonagratia of Bergamo, Michael of Cesena, and John XXII to put the issue to rest.[1]

*Usus* also lay at the heart of the Michaelist-John controversy, which, as many have noted, hearkens back to the older criticisms against mendicant poverty, namely that *usus* cannot be wholly separated from all forms of property rights. It has often been noted that Gerard of Abbeville (d. 1272) pointed out that *usus* cannot be separated from ownership according to Roman law, but it was William of Saint-Amour who made the connection explicit:

> Nec attendunt etiam, quod illarum rerum, quae usu consumuntur (ut sunt alimenta, et vestimenta quotidiana, et pecunia numerata) usus absque proprietate concedi non potest, tamquam impossibile secundum iura; cum eis utendo non possit rerum substantia salva fore; quod est contra naturam ususfructus. Dig. 7.1.1. "Nam hae res non naturali ratione, neque ciuili, recipiunt usumfructum": Inst. 2.4.2.[2]

[1] As usual the bibliography is huge. In addition to the studies listed on p. 7 n. 16 above, I am still partial to the narrative account of these events in Moorman, *History*, 140–204, 307–19; Nimmo, *Reform and Division* is an excellent companion piece; Robson, *Franciscans in the Middle Ages*, is too brief. For the controversy surrounding Peter Olivi, David Burr is the one with whom one should start: "Poverty as a Constituent Element"; *Persecution*; "*Correctorium* Controversy"; *Olivi and Franciscan Poverty*; and *Petrus Ioannis Olivi*. Flood, "Recent Study," reviewed the historiorgraphy.

[2] William of Saint-Amour, *Collectiones catholicae et canonicae scripturae…* d. 4, in *Opera omnia*, 360: "Nor do they attend also that, of the things that are consumed by use (such as

Thus, although the separability of use and lordship had been firmly entrenched in Franciscan poverty writings since the time of *Quo elongati*, a determined adversary could find room to carve out a series of devastating distinctions. John XXII saw a series of situations where both Gregory IX's simple division of *usus* and *dominium* and the more elaborate version employed by Nicholas III failed to account properly for what actually had to take place. There were three related problems. The first was that for any use to be considered just, the *usuarius* had to have at least a *ius utendi*, or, in the case of consumables, at least a property right. Second, the reason one needed a property right for consumables was because the proper definition of use, by which the pope meant *usus* as it was used in Roman law, required that the object of the use remain unimpaired (*salua rei substantia*), and, therefore, one could not, properly speaking, 'use' anything that deteriorated with use. And, last but not least, there was the problem that a corporate body such as a religious order, which in the eyes of the law was but a legal entity, could only be granted a *usus iuris*, not a *usus facti*.

The Michaelist responses to these three problems form the basis of the next three chapters. This chapter will examine the basic nature of *usus*. In the context of the Michaelist-John poverty controversy, this means we must examine in turn how the leading Michaelists understood the following related terms: *usus*, *usus iuris*, *ius utendi*, *licentia utendi*, and *usus facti*.

## 1. *Bonagratia of Bergamo*

Prior to *Ad conditorem*, Bonagratia argued that the pope had asked whether it was heretical to assert that Christ and the apostles "had" anything in common.[3] He further specified what the question had to be about in good

foodstuffs, daily clothing, and counted coins), use cannot be granted without ownership, as it is impossible according to the laws, since using them cannot take place with the substance preserved—which is against the nature of usufruct. Dig. 7.1.1. 'For these things do not receive usufruct by natural reason, nor civil reason': Inst. 2.4.2." Traver, "Identification," 234–71, is the best study of this "prolix, repetitive, and often unoriginal text." Compare Gerard of Abbeville, *Contra adversarium perfectionis christianae* 3.4, in Clasen, "Tractatus Gerardi de Abatisvilla," 172: "Tamen secundum iura humana in illis, quae transeunt per usum, usus non dividitur a possessione, sicut pecuniae non est usus divisus, supple a dominio, nec olei aut frumenti vel vini." See Lambertini, *Apologia e crescita*, 65–78, and Mäkinen, *Property Rights*, 46–53; for biographical details see Grand, "Le Quodlibet XIV," 207–13.

[3] *De paup.*, 323: "In questione qua queritur, utrum asserere quod Christus et apostoli non habuerint aliquid in communi, sit hereticum." Cf. Hervaeus Natalis, *De paup.*, 223, who merely phrased the question in terms of having any *dominium* or *proprietas*.

scholastic fashion: not about Christ insofar as he was God, not before the apostles were apostles, and not about the apostles inasmuch as they were established as prelates of the Church Militant, entrusted with the cure of souls. It was rather about them when they were when they were with Christ or when they had been sent by him as preachers. [4] The phrase *habere aliquid* was likewise too vague for Bonagratia's taste. As he saw it, there were three relevant meanings:[5]

H1. iure dominii vel quasi dominii seu proprietatis aliquid obtinere (to obtain something by right of lordship, or quasi-lordship or ownership);

H2. habere largo modo sumendo (taking "to have" in a broad sense);

H3. habere res: cum earum habet administrationem (to have things: when one has management of them).

Two passages of the *Digest* (50.16.188 and 45.1.38.9) point to the meaning of the first definition (H1). If a person or a corporation has things in this way, "an exception is given to [the person or corporation], or, if one loses it, an action is given" (*datur exceptio, aut si eam perdat, datur actio: Dig. 41.1.52.*) In the second sense (H2), someone happens to hold (*tenet de facto*) a thing only in fact, or holds it for the purpose of a simple use of fact: such a person neither claims nor has anything of right, lordship, or ownership to the thing. In order to show that this was a "rightless" sort of possession, Bonagratia cited a huge mass of canon and civil law. The last definition (H3) applies especially to people who hold positions within the church. No lordship of ownership in the proper meaning of this term is had in this case.

Bonagratia's clearly framed the question in legal terms,[6] though he was not the only one to think in this way. According to his triple distinction Christ and the apostles had things in the second and third sense of "having something," but not in the first, which was what the pope meant to ask. It is not at all clear that this was John's actual position. In fact, I believe that, if pressed, he would have argued that Christ and the apostles held things in all three senses of the term, but he would have disagreed that the first sense (automatically) included the right to sue in court.

[4] *De paup.*, 323–24.

[5] *De paup.*, 324–25. These meanings are analyzed in Damiata, *Povertà e potere* 1:333–36; Kriechbaum, Actio, ius *und* dominium, 27–28; Miethke, *Ockhams Weg*, 371–72; and Tarello, "Profili giuridici," 423–24.

[6] Miethke, *Ockhams Weg*, 375.

The first and second sense of "having something" are the important meanings for our inquiry. Unfortunately, however, the distinction did not lead to a great discussion of the nature of use, which can be summarized quite easily. It will sound familiar but underdeveloped. First, Christ, insofar as he assumed a human nature to repair fallen humankind, had to assume a human nature as it existed in the state of innocence; since people at that time lived without distinct *dominia*, as it is said in *Quo elongati*, Christ must have also done without any individual or common distinct lordship, and managed to get by with only a simple use of fact.[7]

Bonagratia's explanation of *ususfructus* was more comprehensive than other Michaelist accounts. Usufruct, he noted, is an incorporeal right, and defined in the *Digest* as being a "ius utendi et fruendi rebus alienis, salva rerum substantia," that is, a right of using and enjoying *another person's* things. Thus, consumables cannot properly be said to be subject to a usufruct; nor does it make sense to say that usufruct is or is not adjoined to lordship.[8] If we might anticipate the subject of the next chapter for a moment, it is worth noting that Bonagratia pointed out that Roman law admitted *quasi ususfructus* in the case of consumables. Quasi usufruct, a term coined in Justinian law, was a form of usufruct that allowed usufruct of consumables in the sense that security was given to the heir (the term of a usufruct tended to be for the lifetime of the usufructuary) that the same quantity of goods or their monetary value would be returned upon the completion of the term of the usufruct.[9] Bonagratia perhaps relied on the *Glossa ordinaria* here,[10]

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[7] *De paup.*, 497.

[8] *App. ACC*, 106–07: Usufruct "est ius utendi et fruendi rebus alienis, salva rerum substantia, Dig. 7.1.1. Et alibi dicitur quod usus fructus est ius quoddam incorporale, in Inst. 2.2.2. Unde illae res quae usu consumuntur, proprie non recipiunt usum fructum, Dig. 7.5.1 et 7.5.2; et in Inst. 2.4.2. Et ideo improprie dicitur quod usus fructus talium rerum adnexus sit dominio, quia in talibus rebus usus fructus proprie non consistit, et usus fructus qui non est, separari vel uniri non potest, Dig. 33.2.26; nec desinere potest usus fructus qui nusquam coepit, Dig. 35.1.96."

[9] *App. ACC*, 107: "Et quamvis in talibus rebus usus fructus proprie non consistat, utilitatis tamen causa ex benigna interpretatione lex statuit quod quasi usus fructus etiam in talibus rebus constitui possit, ut in dicto Inst. 2.4.2, et in dicta lege Dig. 7.5.1 et 7.5.2. Unde cautio praestanda est ab illo cui in talibus rebus quae usu consumuntur relinquitur usus fructus, ut quandocumque per mortem vel capitis diminutionem extinguitur usus fructus, eiusdem qualitatis et quantitatis res restituantur aut aestimatis rebus certae pecuniae nomine cavendum est, quod commodius est, ut dicitur in dicta lege Dig. 7.5.7, quae cautio et actio oriens ex ea succedit loco rei et habens eam ipsam rem habere censetur, Dig. 46.3.55 et Dig. 50.17.15." Cf. *De paup.*, 509–10. For *quasi ususfructus*, see Berger, "Encyclopedic Dictionary," 665.

[10] Glosses to Inst. 2.4.2, Dig. 7.5.2, and Dig. 7.5.7 cross-reference one another, and Azo said

but the point was clear: whether one took usufruct in its proper sense or not, Roman law admitted a separation of use and lordship, even in the case of consumables.

## 2. *Michael of Cesena*

Michael's analysis of usufruct was simpler than Bonagratia's, but *usus* was subjected to greater scrutiny. The Minister-General castigated the pope for his supposed definition of use in all three of his appeals. The basic point Michael and his followers would make over and over again was that John's definition was not the 'true' definition of *usus*.[11] *Usus* had a number of different meanings, and the pope's was just one of them. Moreover, his was merely a legal definition for all he tried to hide the fact: "Uno modo accipitur in lege civili pro iure utendi, et definitur sic: 'Usus est ius utendi rebus alienis, salva rerum substantia.' Et haec definitio colligitur Dig. 7.8.1, ex textu et glossa."[12] Michael (or perhaps we should say Bonagratia) knew the gloss was Azo's, and in a display of one-upmanship, he also provided a lengthy quotation from Azo's *Summa institutionum*, which further described this type of use—as John himself did—as a personal servitude. Azo, wrote Michael, concluded thus:

> Et de tali usu qui est ius utendi rebus alienis salva rei substantia, loquuntur iura quae dicunt quod res quae usu consumuntur non recipiunt proprie usum fructum, licet quasi usum fructum ex Senatus consulti statuto recipiant, in Inst. 2.4.2 et sequenti; et Dig. 7.5.1 et 7.5.2.[13]

virtually the same thing in his *Summa institutionum* 2.5, quoted at *App. maior*, 255–56; see n. 12, below.

[11] *App. minor*, 436.

[12] *App. maior*, 255: "It is taken in one way in civil law for a right of using, and it is defined so: 'Use is a right of using another person's things, with the substance preserved.' And this definition is collected in Dig. 7.8.1, from text and gloss." *Glos. ord.* ad Dig. 7.8.1.1, s.v. "etiam nudus usus": "id est non solum ususfructus. Sed quid est usus nudus? Respondeo: nudus dicitur in respectu quia est sine fructu; et potest ita definiri: Usus est ius utendi rebus alienis salua rerum substantia. Fruendi enim in definitione usus non ponitur: ut infra Dig. 7.8.2.1. Licet in usufructu ponatur: ut Dig. 7.1.1. Ex qua definitione patet quod usus non potest est proprie in rebus, quae solo usu consumuntur: sicut nec ususfructus: cum in eis non possit esse salua substantia. Licet uideatur contra Dig. 7.5.1 et 7.5.2; ait enim usu consumuntur. Unde uideatur quod usus sit in eis. Sed certe ibi non loquitur de usu, qui est seruitus. Azo." See also Kriechbaum, Actio, ius *und* dominium, 33–34, 43, for this and on what follows.

[13] Quoted at *App. maior*, 255–56: "And the laws speak of such a use, which is a right of using someone else's things with the substance preserved, which [laws] say that things that are consumed by use do not properly allow usufruct, although they accept usufruct by the

At the same time, *usus* could also be taken to mean *actus utendi*, which is called *usus facti*. Azo's *Summa institutionum* was cited again: "Usus qui est *ius vel servitus* non potest esse in rebus quae usu consumuntur, cum in eis non possit esse salva rei substantia; *sed* usus *qui est factum vel in facto consistit, ut in bibendo et comedendo* bene potest esse."[14] When he was dealing with the same point in the *Appellatio monacensis*, he wrote:

> Sed definitio usus a dicto haeretico allegata non est definitio usus universaliter, id est in omni significatione usus sumpti, sed tantum particulariter sumpti, scilicet usus iuris civilis, qui non est usus universaliter sed solum particulariter sumptus.[15]

Even in Roman law use could be taken for either a *ius utendi* in the pope's sense, that is, a *usus iuris*, or for an *usus facti*.[16] Michael thus argued that *usus* had two primary meanings in the context of the poverty controversy: it could refer to a legal right or to the physical action. This division of *usus* was fundamental to the Michaelist position.

### 2.1. *Usus iuris*

A use of right or *usus iuris* is a nebulous term in the poverty controversy.[17] As Michael saw it, there were several types of *usus iuris*; he mentioned three in particular: there was a *usus iuris civilis*, a *usus iuris naturalis*, and a *usus iuris divini*. Apparently, the so-called use of civil right could itself be divided into a "universal" and more restricted sense.[18] Although this point was never

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statute of a Senatorial decree, in Inst. 2.4.2 and the following; and Dig. 7.5.1 and 7.5.2." These are not Azo's words.

[14] Quoted at *App. maior*, 256–57: "Use, which is *a right or servitude* cannot exist in things that are consumed by use, since in these things it cannot be that the substance of the thing is preserved; *but* a use *that is a deed or consists in a deed, such as eating or drinking*, can well exist." Italics indicate direct borrowings from *Summa Azonis* ad Inst. 2.5 (Turin, 1966, 357b).

[15] *App. mon.*, 829: "But the definition of use allged by the said heretic is not a definition of use taken universally, that is, one for every signification of use, but only taken particularly, namely a use of civil right, which is not use taken universally, but only taken particularly." On the following page we read that John's definition of use is one that only explicitly accounts for using *someone else's* things, a further sign that his definition only covered *usus* as a legal term. Cf. *App. mon.*, 839.

[16] *App. mon.*, 832–33, explaining Inst. 2.5.1.

[17] The *Appellatio minor* is a good example of this: it only uses the term twice, and never explains what it is supposed to mean other than it is a civil law term; see *App. minor*, 431 (a quotation from *ACC*$^2$ 85–88 [236]) and 443 (also a reference to *ACC*$^2$). See also the relevant passages in *App. mon.*, 833, 841, and 843.

[18] *App. mon.*, 830, on John's strict definition of use: "Ergo dicta definitio non est definitio usus universaliter sed tantum particulariter sumpti, scilicet usus iuris civilis, qui non est usus

elaborated—the focus was always on the use of civil right—, we cannot be too far off if we imagine that these sorts of use are guaranteed or legitimized by the corresponding type of law (*ius*).

In general, Michael tended to use *usus iuris* as an approximate synonym for *ius utendi*. John's general point about *usus iuris* was that this is what kind of use his predecessors had given the Franciscans—i.e., their Order—when they declared that the friars had the use of things.[19] This prompted Michael to explain the term in this context:

> Habere autem usum iuris in communi est habere proprietatem in communi, quia usus, prout est iuris, est ius proprium utendi aliqua re pro qua datur actio in iudicio habenti tale ius, sicut ex obligatione, ut Inst. 2.2.2(!).[20]

Thus in Michael's opinion a use of right was a *ius proprium utendi*, precisely in the sense of being able to sue in court like one could who had an *obligatio*. What Michael meant was that the right, like an obligation, was considered a *res incorporalis*, even though they existed in reference to corporeal things. An obligation, moreover, "est iuris vinculum, quo necessitate adstringimur alicuius solvendae rei secundum nostrae civitatis iura."[21] Michael was likely thinking of the type of obligation that arises from loans, either a *mutuum* or a *commodatum*, for which a debtor was liable in court.[22] It goes without saying that the friars were not to be on either side of a relationship of this sort.

Rooted as it was in positive law rather than natural law, the key characteristic of a right of using was that it was inherently actionable: "Et talis usus iuris ex quo competit ius agendi in iudicio, dicitur usus proprius."[23] Use is exclusive (*proprius*) insofar as it is legally defensible, and even then only in the sphere of positive law, which is also where rights to action (*ius agendi*, *actio*) belong.

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facti, nec usus iuris naturalis, nec iuris divini, nec iuris civilis universaliter et omni modo sumpti…."

[19] See p. 51, above.

[20] *App. maior*, 378: "Now, to have a use of right in common is to have ownership in common, because use, insofar as it is 'of right,' is an exclusive right of using something for which an action in court is given to the one who holds such a right: just like by an *obligatio*, as in Inst. 2.2.2." Gál and Flood have "in dicto 1 in I. [2.2] *De rebus incorporalibus*," but that makes no sense; perhaps it should be "in dicta l.," where the "said *lex*" is to the reference to Inst. 2.2.2 in the previous paragraph.

[21] Inst. 3.13 pr.; cf. Dig. 44.7.3 pr., discussed on p. 74 n. 41, above..

[22] Inst. 3.14 pr.–2; cf. Cod. 4.10 *passim*.

[23] *App. maior*, 401: "And such a use of right, by which [right] there coincides a right of acting in court, is called an exclusive use."

### 2.2. *Ius utendi*

A *ius utendi* or right of using, then, falls under the category of a *usus iuris civilis*, which itself derives from positive, civil law. Michael specifically related the idea to categories of Roman law:

> Constat autem quod habere ius utendi in aliqua re, secundum iura civilia includit necessario usum proprium sive proprietatem usus, cum, ut superius est probatum, lex civilis definiat usum talem in haec verba: "Usus est ius utendi rebus alienis, salva rerum substantia," et dicat quod talis usus est servitus personalis et res incorporalis, quae in iure consistit, sicut haereditas et usus fructus, obligatio [cf. Inst. 2.2.2] et actio.… Et ideo sicut qui habet usum fructum, habet proprium usum sive proprietatem in usu, sic et qui habet usum qui est ius utendi re aliena.[24]

Michael extended the pope's definition of *ius utendi*. In the context of positive law, a right of using included what we might call "personal" or "exclusive" use or even the "ownership of use." It was a personal servitude, which was a *res incorporalis*, on the same level as the right of inheritance,[25] usufruct, obligations, or rights to legal action.[26] Michael turned the pope's argument on its head. If a *ius utendi* was a personal servitude like usufruct was, then because the holder of usufruct had "ownership of the use," so did the holder of a *ius utendi*. After all, usufruct is essentially a *pars dominii*.[27]

Were we not already sure of Michael's conclusion, the reference to *obligatio* and *actio* hints at the direction Michael's thought was tending. The *Appellatio minor* sums up the ultimate connection quite nicely: John's use of *ius utendi* had to refer to a civil and worldly (*civili et mundano*) right of using, an exclusive right of the type for which an action is given in court—which

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[24] *App. maior*, 261–62: "Now it is agreed that to have a right of using some thing necessarily includes, according to civil laws (*iura*), an exclusive use or the ownership of use, since, as it was proved above, civil law defines such use in these words: 'Use is a right of using another person's things, with the substance of the things preserved,' and says that such use is a personal servitude and an incorporeal thing, which exists in law, just as does inheritance, usufruct, obligation, and action.… And, therefore, just as he who has usufruct has exclusive use or the ownership over the use, so does he who has a use that is the right of using another person's thing." Michael was referring to his quotations from Azo's *Summa institutionum* (above, p. 179).

[25] Berger, "Encyclopedic Dictionary," s.v. "hereditas" (485), noted two meanings for the term. It can refer to the "complex of goods, rights, and duties of the deceased," or, according to Dig. 50.16.24, it can mean a "successio in universum ius quod defunctus habuit." Michael was surely thinking of this second meaning.

[26] For *actio* and *servitus*, see above, p. 50.

[27] *App. maior*, 262, citing Dig. 7.1.4. But cf. Dig. 50.16.25 pr. Both passages are discussed by Willoweit, "*Dominium* und *Proprietas*," 142.

was one of the very things the apostles left behind. Even the multitude of believers went without any sort of *ius proprium*.[28] This is all connected to his point that only people who are *sui iuris* are given an *actio furti*, not only when despoiled of their ownership or lordship, but also for properly acquired (e.g., through purchase) use or other licit modes of having.[29]

In essence, then, Michael argued that a right of using is a *ius proprium*, which itself is a *res incorporalis*, and that it is a *ius proprium*, or, in the pope's terminology, a *ius personale*. More to the point, this *ius proprium* does not derive from natural, but positive law.[30] The fact, moreover, that the pope expressly called it a "personal right" only shows that none of the early believers could have had it, for none of them said that anything was his or her own.[31]

What holds for an individual holds for a community as well: just as an individual may or may not have a right of using, so may a community have or not have the same right. The general community of believers held their houses, estates, possessesions, and goods in common, and these things were said to be of their community such that an *exceptio* is given to the community in court.[32] In the corresponding ecclesiastical community, the point is that the community is in some sense a temporal one—one which excludes personal property while allowing *quasi quaedam collegialis proprietas*—in which every cleric of the "collegiate" Church can take legal action in order to recover the goods of this church or allege an exception in order to defend them.[33] The Franciscans, Michael noted, have renounced such a collegial community, content rather with an ecclesiastical communion alone.[34] By

[28] *App. minor*, 437; cf. *App. mon.*, 784–85.

[29] See p. 134, above. The passage (*App. mon.*, 759) continues: "Et si debitor subtrahat rem quam obligaverat creditori, datur ipsi creditori contra dominum actio furti, in Inst. 4.1.10."

[30] *App. maior*, 263: "Et tale ius est ius proprium, ut patet per iura superius allegata, sine quo iure dictus dominus Ioannes intelligit usum simplicem facti haberi non posse … maxime ubi supra dicit quod ius utendi est mere ius personale.… Praeterea, certum est quod ius proprium non est de iure naturali, C. 12 q. 1 c. 2, sed de iure positivo, D. 8 d.a.c. 1." Michael was referring back to the quotation from Azo's *Summa institutionum*; see *App. maior*, 255–56, quoted above, p. 179.

[31] *App. maior*, 263.

[32] *App. maior*, 341, citing Dig. 41.1.52. Cf. Bonagratia's comments on p. 177, above.

[33] *App. maior*, 342: "Unde etiam talis communitas est temporalis, quia licet in ea excludatur personalis proprietas, includitur tamen in ea quasi quaedam collegialis proprietas cuius quilibet de collegio quodammodo particeps esse dignoscitur, dum unusquisque clericus ecclesiae collegiatae habet actionem ad res ecclesiae suae recuperandas et exceptionem ad defendendas."

[34] *App. maior*, 342: "Unde Fratres Minores tali communitati collegiali renuntiant, et omnem proprietatem personalem et collegialem a se abdicant, sola ecclesiastica communione, cui non est licitum renuntiare, contenti."

*ecclesiastica communio* Michael was referring to the "communion" grounded in the second type of *communitas* on which the primitive Church was based. Things are commonly possessed, but only by the bond of fraternal charity, which itself is based on divine *ius*; and they are, moreover, possessed only with respect to use, not ownership or lordship.[35]

### 2.3. *Licentia utendi*

John was unwilling to distinguish between a right of using and a licence of using. Michael, in turn, unfairly exaggerated John's argument.[36] As we just saw, the Michaelists maintained that a key feature of a right, especially a right of using, was that it was inherently defensible in court. In contrast, a *licentia utendi* was not and never could be. Michael found his proof for this claim in both canon and Roman law. After all, he noted, it was in fact a question *de iure*.

Michael's starting point was a discussion of the *peculium* from Roman law.[37] A *peculium* referred to a sum of money granted by the *paterfamilias* to his son or slave for their use; usually, the idea was for the son or slave to employ this money in various commercial ventures, though this need not be the case. The reason the *peculium* was attractive to the Michaelists was due to the fact that any *obligatio*—i.e., any rights, duties, or debts—arising from any activity of the *peculium*, is acquired by the head of the household.[38] In Michael's words:

> Nam servus habet licentiam a domino utendi rebus domini sui et tamen non habet in eis ius utendi, sicut patet Dig. 15.1.25, ubi glossa dicit idem esse in famulis dominorum qui utuntur rebus dominorum de eorum licentia et idem est in religiosis qui habent licentiam a dantibus vel a praelatis suis rebus, et tamen constat quod non habent ius utendi in eis, ut notatur in praeallegato C. 19 q. 3 c. 9.[39]

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[35] See above, p. 104, and Appendix A below.

[36] See *App. mon.*, 829–41.

[37] Dig. 15.1–2 and Cod. 4.26, *passim*.

[38] Inst. 3.28 pr.: "Expositis generibus obligationum, quae ex contractu vel quasi contractu nascuntur, admonendi sumus adquiri vobis non solum per vosmet ipsos, sed etiam per eas quoque personas, quae in vestra potestate sunt, veluti per servos vestros et filios." See Evans-Jones and MacCormack, "Obligations," 171.

[39] *App. maior*, 264: "For a slave has from his lord a licence of using his lord's things, and nevertheless he does not have a right of using in them, just as is clear in Dig. 15.1.25, where the gloss says it is same in the servants of lords who use their lords' things at their licence, and the same in religious who have a licence to things from the donors or their prelates, and yet it is agreed that they do not have a right of using in them, as it is noted in the previously alleged C. 19 q. 3 c. 9."

Michael was perhaps wrong about the gloss, but right to mention *peculium*.[40] The reason for the reference to the gloss is because there were two sorts of *peculium* according to Dig. 15.1.25, one where the lord gave the slave something for his personal use, and another where the slave had to use something for a certain purpose. The second situation is not exactly an example of a *peculium*.[41] The connection of this point to *Si qua mulier* (C. 19 q. 3 c. 9), which explained that no matter the situation of the man or woman entering the order, he or she no longer had any property, only served to make Michael's comparison between a slave and a religious that much more explicit.

The licence was also to provide the conceptual framework to understand the example from the opening of the *Decretum* where it was said that it was *fas*, but not *ius* to pass through another's field. Unfortunately, the reasoning is not as self-evident as Michael seemed to think. The text reads:

> Sic etiam dicitur quod quis habet licentiam transeundi per agrum alienum, et tamen non habet ius civile transeundi, D. 1 c. 1. Item, de iure divino fas est, id est licentia conceditur alicui, comedere uvas in vinea proximi sui de Deuteronomii 23, 24.[42]

At first glance it would seem that having a licence to do an action means that the action is lawful according to divine law, but what Michael must have meant was that divine law "allowed" certain actions, they were *fas*, provided one had a licence (or better) to do them; in this case, of course, the licence comes from God, but that need not always be the case. This was the argument found in the gloss to *fas est*, where it is noted that something may be equitable by divine law (insofar as it does not harm someone else),

[40] I have found no gloss to Dig. 15.1.25, *Id vestimentum*, that compares the situation of a religious to a slave in the way Michael suggested. I recently offered a tentative explanation of what is going on in "Property Rights," 178 n. 166.

[41] Dig. 15.1.25: "Id vestimentum peculii esse incipit, quod ita dederit dominus, ut eo vestitu servum perpetuo uti vellet eoque nomine ei traderet, ne quis alius eo uteretur idque ab eo eius usus gratia custodiretur. Sed quod vestimentum servo dominus ita dedit utendum, ut non semper, sed ad certum usum certis temporibus eo uteretur, veluti cum sequeretur eum sive cenanti ministravit, id vestimentum non esse peculii." The *peculium* itself is subject to variation; according to Cod. 4.26.10 pr.–1, slaves may have either have a *libera peculii administatio* or not, and in the latter case they are obviously far more limited in their actions concerning the *peculium*.

[42] *App. maior*, 264: "Thus it is also said that someone has a licence of passing through another person's field, and yet he does not have a civil right of passing through: D. 1 c. 1. Likewise, it is allowed by divine right, that is, a licence is granted to someone by Deuteronomy 23:24 to eat the grapes on his neighbour's vine."

but that it is not necessarily *ius* in the sense that one has a civil action.[43] Conversely, we might add that the granting of a (positive law) licence to do actions that are *contra ius* (*ciuile*) would not make those actions *fas* (by divine law). A licence from a "lower" law cannot grant dispensation from a higher law. Ockham would repeatedly make this point in various formulations.[44]

The classic example, which all Michaelists referred to at some point or another, was that of a guest eating at another's table.[45] Michael used it in both of his longer appeals; the *Appellatio monacensis* gives the better account:

> Item, manifestum est quod divites pauperibus ad suas mensas vocatis sive invitatis non concedunt communiter omne dominium quod ipsi divites habent in alimentis ipsis pauperibus appositis, quoniam ut plurimum non concedunt eis potestatem nec dominium ipsa alimenta alienandi, nec asportandi vel distrahendi, sed tantum edendi et bibendi, quod tamen dominium ipsi divites habent immediate in eis. Et ita constat quod divites in ipsis alimentis pauperibus appositis sibi retinent aliquod dominium proprium et immediatum quod pauperibus communiter non concedunt.

When a rich man invites the poor to sit at his table, he does not typically give them lordship of the food: that is, they have no power of alienating, carrying away, parcelling up the food (for piecemeal sale), only the power to consume it. Michael continued:

> Alioquin si divites eo ipso quod concedunt pauperibus licentiam comedendi et bibendi de appositis in mensa intelligerentur concessisse per consequens eis omne dominium ipsorum alimentorum, sic quod nihil sibi retinerent, non possent postea eis libere et absolute concedere quod possent ipsa alimenta libere asportare et alienare, quia concedens omne dominium et nihil sibi retinens in re concessa non potest de ipsa amplius aliquid disponere vel ordinare.[46]

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[43] *Glos. ord.* ad D. 1 c. 1, s.v. "fas est": "id est aequum est, cum subest causa, et innoxius est transitus: ut C. 23 q. 2 c. 3. Item iure diuino licitum est comedere uuas in agro alterius, sed non exportare: conterere spicas et comedere licitum est. C. 6 q. 3 c. 1. Sed non mittere falcem: ut infra D. 5 de cons. c. 26. Sed licet sit aequum iure diuino: tamen non est ius, id est ius non dat ciuilem actionem." The point is paraphrased in *App. maior*, 265.

[44] E.g., *AP* 7.41–45 (1:253–54); see p. 214 n. 172, below, for similar references. On the *AP*, see Nederman, "Royal Taxation."

[45] *Impug.* § 14 (248), combines the example of slaves, *filiifamilias*, clerics, and guests invited to dinner in one fell swoop.

[46] *App. mon.*, 828–29: "Likewise, it is clear that rich men do not generally grant to the poor people invited (or not) to their tables all the lordship that the rich men themselves have in the food placed before the poor, for they do not usually grant to them the power or lordship of alienating the food, nor of carrying it away or parceling it out, but only of eating and

A crucial point for Michael was that the licence was only as good as far as it was granted (*quantum conceditur*):[47] if the lord demanded his guests stop eating partway through the meal, there was nothing more to be said on the matter. The licence was revoked and there was no legal recourse to be had. If the licence of using were identical to the right of using, on the other hand, these guests would be free to do more or less as they pleased with the rich man's food and drink; and, additionally, the licence-holders would also have legal remedies at their disposal if their use were somehow impeded.

This is the sort of licence the friars have. Even in worthless things, the friars have no lordship, ownership, or right, for while they can give away these sorts of things when they have reasonable cause to do so as well as a licence from their superiors (*ex causa rationabili, et habita licentia superiorum*), they can do no more than that, which is far short of what real owners can do.[48] The *Appellatio monacensis* fills the picture out a little more. Both *Exiit* and *Exivi* show that,

> Fratres Minores, quibus tam a dominis eis offerentibus et dantibus res quam a ministris eorum concessa eis licentia sive potestas utendi rebus, habent et habere dicuntur in ipsis rebus simplicem usum facti, quia ut in ipsis capitulis patet, simplex usus facti dicitur ex eo quod separatus est a proprietate et dominio et usu iuris civilis particulariter sumpti, qui est proprium ius utendi rebus alienis, salva earum substantia, pro quo usu competit proprium ius agendi in iudicio, non ex eo quod separatus sit a licentia et concessione utendi, quia si esset separatus ab omni licentia et concessione utendi, tunc non esset ius iustum [*read:* usus iustus] sed potius abusus illicitus.[49]

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drinking; which lordship, nevertheless, the rich men themselves directly have in those things. And thus it is agreed that the rich men retain for themselves some exclusive and immediate lordship of the food placed before the poor, which they do not generally grant to them.… Otherwise, if the rich men, by the fact that they grant a licence to the poor of eating and drinking from the things placed on the table, are understood to have consequently granted to them all lordship of that food, to the extent that they retained nothing for themselves, then they would not be able afterwards to freely and absolutely grant to them that they could freely carry away that food and sell it: for he who grants all lordship and retains none for himself in the granted thing can no longer make arrangements or order anything about it." Cf. *App. maior*, 264, and *App. mon.*, 837.

[47] *App. maior*, 264.

[48] Cf. *App. maior*, 288–89.

[49] *App. mon.*, 839: "The Friars Minor, to whom a licence or power of using things was granted, both by lords offering and giving things to them and by their ministers, have and are said to have a simple use of fact in them, for, as is clear in those chapters, it is called a simple use of fact because it is separate from ownership and lordship, and a use of civil right taken particularly (which is an exclusive right of using someone else's things with the substance preserved), for which use there belongs an exclusive right of action in court—[and] *not* because it is separated from a licence and concession of using, for if it were separate from

We shall return shortly to the questions of lordship and use, but for now the point to note is that what was granted was a licence *or power* of using, and that this is a sufficient condition to ensure that the action was just. By "power," it is clear that Michael meant a sort of moral power, not the physical capacity for the deed. Thus we should say that the *licentia utendi* was a moral licence, which is not necessarily connected with positive law. This equation of licence and power, moreover, shows that the *dominus rei* is the one who grants something which is called a licence *or* a power. That is, these are not innate "subjective" qualities—or, as Ockham might describe them, natural powers[50]—for Michael. We should therefore be careful when we read phrases like *potestas utendi*, for they may sound more subjective than they actually are.

Michael also briefly discussed a different kind of licence. We have already seen that necessity can dispense with the laws. When necessity demands it, then, one also has a licence to take the steps necessary for survival. This is the explanation that underwrites John 4:8, for example, where the disciples are described as going into the city to buy food. It was a time of present necessity (*necessitatis instantis*), and the general prohibitions do not apply, which is why Christ told those who had a sack and staff to take it with them, or to sell their tunic and buy a sword (Lc. 22:36). But, he added, the licence itself ceases when the source of the necessity ceases (*cessante ipsa causa necessitatis, cessabat et ipsa licentia*).[51] Although Michael leaves this licence relatively unexplained, clearly it is (as it were) a *licentia ex necessitate*. What the licence allows must depend on the kind of necessity—e.g., using money to buy food. Thus, there must be a *licentia utendi* that comes into play when one must use the things of another, even against their will, in order to preserve one's life.

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every licence and concession of using, then it would not be a just use, but rather illicit abuse." I read *usus iustus* since Michael's point is about what does or does not constitute a just simple use of fact.

[50] *SL* 1.55.51–53 (OPh 1:181) "Aliud genus qualitatis ponitur potentia naturalis vel impotentia. Unde omnis res qua potest aliquid faciliter agere uel resistere actioni in hoc genere ponitur." For an overview of Ockham's logical programme in the *Summa logicae*, see King, "*Summa logicae*"

[51] *App. maior*, 396–97: "with the cause of necessity itself ceasing, the licence itself ceased." And a little below: "Nec tales casus [i.e., times of necessity] sunt ad consequentiam trahendi, ut dicatur in tali casu necessitatis fuit licitum, ergo simpliciter fuit licitum. Immo, potius sequitur et dici debet quod dispensative ex causa necessitatis concessum est, simpliciter intelligitur esse prohibitum, ut dicunt iura, et superius est probatum." See Gouron, "*Cessante causa, cessat effectus*," for the related adage.

This was, naturally, the licence Nicholas must have meant in *Exiit*, when he wrote: "Quibus rebus fratres licite uti possunt durante licentia concedentis."[52] Thus, to John's memorable argument from *Ad conditorem*[2] that it was ludicrous to believe that Nicholas had intended to reserve the lordship "of one egg, rind of cheese, or crust of bread," which were only given to the friars for consumption,[53] Michael pointed out that earlier popes had granted that licence to the brothers to give away, so long as the superior agreed (*et habita licentia superiorum*), cheap things of little value.[54] The conclusion was felt to be obvious: if Nicholas granted an explicit licence, this meant he did not grant them any sort of rights. Otherwise the grant of a licence would be unnecessary and superfluous. Thus, the friars only had a licence, and a mere licence was well short of a right of using.[55]

### 2.4. *Usus facti*

Use of fact is the only kind of use the Franciscans were to have. Most Franciscans up to the time of the Michaelist split seemed to believe the meaning of the term was simply self-evident;[56] however, even a quick reading through the relevant sources shows that there was no unanimous agreement on what the term meant. Perhaps the best example of this comes from the cardinal Vital du Four (*ca.* 1260–1327).[57] Vital's *Compendiosa resumptio* made the standard point that the only thing Christ and the apostles had was a simple use

[52] *App. maior*, 264, quoting *Exiit*, 2:1113.

[53] *ACC*[2] 85–98 (236–37); see *App. maior*, 289.

[54] *App. maior*, 288–89: "Quod patet etiam ex eo quod dicti pontifices concedunt licentiam fratribus ut de rebus mobilibus vilibus seu parum valentibus possint ex causa rationabili, et habita licentia superiorum, extra Ordinem elargiri." Similar ideas can be found in the contemporary *constitutiones generales* of the order; see, e.g., those of Lyons (1325), num. 3.7, in Cenci and Mailleux, *Constitutiones generales O.F.M. II*, 143. Discussed further in Robinson, "Property Rights," 162–63.

[55] *App. maior*, 289.

[56] Of the various pre-*CIN* Franciscan responses to John's question regarding the poverty of Christ and the apostles, most omit a discussion of their use of things; and those who do mention it, tend to take its meaning as unproblematic. The archbishop of Salerno merely wrote that Christ and the apostles had simple use of fact without lordship; see Tocco, *La Quistione*, 75. An anonymous *magister* wrote that the pope's question cannot be one "quoad simplicem facti usum sed quoad dominium" (ibid., 61). Bernard de la Tour cited *Exiit* as evidence that simple use of fact can be separate from both usufruct and a right of using, even in consumables (ibid., 73).

[57] For biographical details, see: Traver, "Vital du Four," 670–71. For an analysis of his writings on poverty, see Horst, *Evangelische Armut*, 31–34 and Nold, *Pope John XXII*, 74–83.

of fact.[58] But when he came to talk about consumables, a slightly different picture emerged. An objection was raised that simple use of fact was merely the consumption of a thing, which only existed during the act of consumption, and which, therefore, could not be separate from lordship.[59] But since Adam and Eve clearly used consumables in the state of nature, there was at that time use without ownership and lordship. Rather, they had the usufruct of Paradise without lordship. God owned the goods Adam used, and Christ, who wanted to return the *collegium apostolicum* as far as possible to the state of "instituted nature" (*instituta natura*), gave them "necessary use of things" without giving them possession or lordship.[60] Perhaps this confusion was due to the fact that this was a *reportatio* of the consistory debates, but at the very least to switch from simple use of fact to usufruct to necessary use indicates that even amongst the so-called Franciscan Community, there was not full consensus as to what Christ and the apostles "had" by their simple use of fact.[61]

Things become somewhat clearer, and certainly more consistent, with the Michaelists. As we saw near the beginning of this chapter, Bonagratia equated simple use of fact with "tenere de facto,"[62] This served as the conceptual starting point for all subsequent Michaelist definitions. In his various appeals, Michael re-specified what he thought simple use of fact meant. The shorter appeal is the most elusive of the three. Throughout one gets a sense that Michael was treating *simplex usus facti* and *actus utendi* as synonyms, but this is never stated directly.[63] Of course, Michael continually referred his readers to the longer appeal for the full argument, so it is not surprising that the *Appellatio minor* is somewhat unsatisfactory. We can perhaps sympathize with John on this point.

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[58] Tocco, *La Quistione*, 51.

[59] Ibid., 81–82: "Et contra hanc responsionem objicitur: simplex usus facti non est res aliqua, sed sola consumptio rei in quibusdam, ita quod usus talis non perxistit [*sic*], sed tunc solum est, dum res actu consumitur, et per consequens non potest usus a dominio separari, propter quod haec propositio: iste habet hujus rei simplicem facti usum, non habet multas causas veritatis sed unam tantum, cum in talibus usus et dominium sint inseparabilia. Unde cum dicitur: iste habet talem rerum simplicem usum, ergo habet dominium, non committitur fallacia consequentis."

[60] Ibid., 82–83.

[61] On the origins of the so-called community, Cusato, "Whence 'The Community?'" is fundamental; see also Burr, "Effects," 277–79.

[62] See above, p. 177.

[63] See, e.g., *App. minor*, 434–35 and 438–40.

The situation was a little better in the *Appellatio maior*, though it still lacks the clarity of either Francis's or William's tracts. Use itself, as we saw above, was divided into two general categories: use as a legal right or as an act of using, which is even recognized *in omni iure*.[64] This type of use is called *usus facti*. Sometimes Michael spoke about a "simple" use of fact, but this added specification meant little in practice. The point was simply that it was separate from lordship, ownership, and use taken particularly from civil law (i.e., a right of using), though not necessarily without a licence of using or "concessio utendi."[65] The sort of use of fact—exercised by Christ, the apostles, and the Franciscans—was also not denuded of *ius divinum*, whereby the use of all things is common to all.[66]

Thus, like Vital to some extent, Michael argued for the identification of *usus facti* with necessary use: the holy doctors of the Church, explaining and expounding sacred Scripture with the spirit of God, clearly determined and proved that "Christus et apostoli in rebus quibus usi sunt non habuerunt nisi usum illum sine quo humana natura sustentari non potest, qui est usus facti."[67] Similarly, *in lege naturae*, there was a simple use of fact common to all for all things necessary to sustain human life.[68] Use of fact, then, covers using the things one needs to preserve life. Michael went on immediately to say that Christ and the apostles had assumed the manner of using (*modum utendi*) things that had prevailed in the state of innocence, which—of course—was common to all and where no one had more of a right of using anything than anyone else (*plus ius utendi quam alter*).[69]

This picture gets a little complicated in the *Appellatio monacensis*. In *Quia vir* John had argued that, *post distributionem*, the individual believers described in Acts had become property-holders and lords of their assigned portion regardless of whether their use was only of necessities or not. The solution to this objection required yet another exposition of what Clement had meant in *Dilectissimis*, particularly the bit about how things were common then (after the fashion of sunlight or air being common to everyone

[64] *App. maior*, 256; see also above, p. 179.

[65] *App. mon.*, 839.

[66] *App. maior*, 403.

[67] *App. maior*, 400: "In the things which Christ and the apostles used, they did not have anything but that use without which human nature cannot be sustained, which is a use of fact."

[68] *App. maior*, 264: "Et certum est quod in lege naturae erat usus facti simplex, communis omnibus in rebus ad vitae humanae naturae sustentationem necessariis, nec erat tunc huiusmodi ius utendi quod postmodum per leges exstitit introductum."

[69] *App. maior*, 400–01.

without anyone having lordship of the portion they use or enjoy). These sorts of things are common to all, *de iure naturae*; Michael wrote that they were not divided in terms of "a lordship of ownership," but rather a "faculty of using"; the same, he thought, was true of that community: things were only common in terms of use or a faculty of using.[70]

Michael had already used *potestas* to describe the nature of *dominium* and *licentia*; now, somewhat confusingly, he also called the faculty of using a power. Referring to the early community of believers he called it a "licita facultas et potestas utendi."[71] This faculty-and-power to use their assigned portion had to be what the believers received because we know that no one was needy among them, and we know that having lordship of things does not necessarily remove need. The proof for this last claim depended on Ecclesiastes:

> Non enim ideo negatur aliquem dictorum primorum credentium dici egentem quia proprietarius et dominus foret quilibet suae portionis. Multi enim habent proprietates et dominia rerum et tamen sunt egeni, quia non habent facultatem utendi ipsis rebus, iuxta quod dicitur Ecclesiastae 6, 1–2: *Vidi malum sub sole, et quidem frequens apud homines vir cui dedit Deus divitias et substantiam et honorem, … nec tribuit ei Deus potestatem ut comedat*.[72]

It is rather the faculty, a power of using the things necessary for life which removes need. For, just as a father, in a sense (*ad sensum*), owns all the possessions of the household, the sons and slaves of the family have the use of these necessities, which is why they are not needy; and of course they do not have any ownership or lordship of these things. Much the same could be said of monks and the first believers, who prefigured the monks.[73] In like

[70] *App. mon.*, 808: "Ex quibus [i.e., *Dilectissimis*] clare patet quod sicut aer et splendor solis sunt omnibus hominibus de iure naturae communia, nec dividuntur quod dominium proprietatis, licet dividantur secundum diversas regiones quoad facultatem utendi, ita bona ipsorum credentium non fuerunt inter eos divisa quoad dominium proprietatis sed solum quoad usum sive facultatem utendi, et per consequens quod res remanebant indivisae quoad dominium post divisionem sicut ante."

[71] *App. mon.*, 812, responding to *QVR*, 561: "Dicendum est quod post divisionem aliquid plus habebant quam ante, et tamen illud plus non erat proprietas et dominium ipsarum rerum, sed erat licita facultas et potestas utendi portione sibi assignata."

[72] *App. mon.*, 809: "For, it is denied that, *because* each one would be a property-holder and lord of his portion, some one of the first believers is therefore not called needy. For many have properties and lordships of things, and yet they are needy because they do not have a faculty of using those things, according to what is said in Ecclesiastes 6:1–2: *I saw evil under the sun, and indeed frequent among men; a man to whom God gave riches and substance and honour … and God did not give him power to eat*" (emphasis added).

[73] *App. mon.*, 809–10, citing Inst. 2.9.1, 2.9.3, and Dig. 48.5.22(21) and 41.2.49.1.

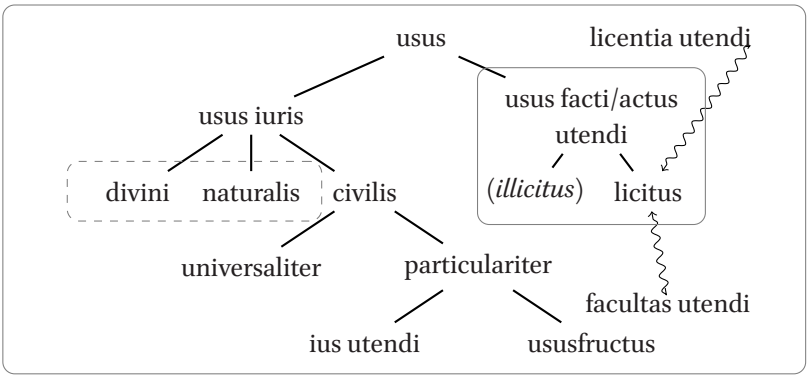


Figure 5.1: Michael of Cesena on *usus*

manner, such a faculty excludes the ability to alienate, sell, or do the other actions normally associated with lordship.[74]

### 2.5. *Preliminary Conclusions*

We can now summarize Michael's account of *usus* in the following way (Fig. 5.1).[75] The fundamental division was between a *usus iuris* and the *usus facti*, which was but the act of using. Use of right was divided into three kinds: a *usus iuris ciuilis*, a *usus iuris naturalis*, and a *usus iuris diuini*. He further subdivided the "use of civil right" into two categories: a universal and more restricted type. (The reason for this is unclear, but perhaps he was simply trying to make the pope's definition seem even narrower.) The "particular" use of right included at least the pope's right of using and usufruct. In both cases these qualified as individual use or a personal right. The other side of *usus* was the so-called use of fact, which in the context of apostolic poverty referred to the use Christ and the apostles had for the things necessary for survival. The use of necessities, however, falls under a precept of natural and divine law, not civil law.[76]

[74] *App. mon.*, 815–16.

[75] The boxed regions of the diagram indicate the types of use the Franciscans are said to have. Dashed lines or boxes represent more tentative conclusions.

[76] *App. maior*, 232: "… quia usus rerum necessariarum ad vitae humanae sustentationem cadit sub praecepto legis naturalis et divinae per quod ad esse naturae conservandum quilibet est indispensabiliter obligatus. Unde tolli non potest, D. 5 d.a.c. 1 in principio capituli; et D. 6 d.p.c. 3."

Michael also made mention of a *facultas utendi* and a *licentia utendi*, characterizing both of them as a *potestas*. In this context it seems that we should translate "potestas" as "ability": if one has the "power" to use something, one is therefore able to use it. But being able to use something due to a licence is not entirely the same as to use something due to a faculty. A licence is what the *dominus rei* can grant; the lord could do more than that if he wished, but when he gives someone something, he is under no obligation to give them a full *ius* to the thing. Examples of this practice abound, from the *peculium* of a slave or minor to guests invited to the dinner table. In all cases, the licence suffices to make the act of using licit, but does not provide anything more than a power to use the thing in the way or ways specified by the owner of the thing in question. In times of necessity, however, all bets are off, and there exists a licence based in natural law by which we are entitled to take the steps needed to preserve our own life. Yet this licence is commanded by natural law. It is neither granted at the whim of some owner, nor is it 'up to us' whether to make use of it or not: we are required to take these steps—but only so far as the need exists.[77] The first *communitas rerum temporalium* is based on the *ius necessitatis naturae*, and we cannot renounce it. Here, the force of the argument sounds more like a duty or obligation than a liberty which we might choose to exercise or not.[78]

It seems to be different with the *facultas utendi*. For lack of a better candidate this faculty seems to be nothing other than the raw ability to use something. When Michael wrote that things were "common with respect to use or the faculty of using," he meant that they had the ability to use these things unlike the people in the example of Ecclesiastes 6:1–2. This is perhaps also why he explicitly qualified the power as *licita*: the faculty of using is not inherently and necessarily licit. A thief, after all, has the raw ability to use things; this is what landed Jean Valjean, the protagonist of *Les Misérables*, in jail. In the primitive Church, however, things were made common on the basis of divine law, by the bond of fraternal charity, so naturally their faculty of using must be considered licit. The same would have held in the prelapsarian state of nature insofar as a positive community of goods existed.

[77] *App. maior*, 359, quoting C. 1 q. 1 c. 41; cf. *App. maior*, 397, citing C. 1 q. 7 c. 7, and *App. mon.*, 789, with further references.

[78] One is reminded of Henry of Ghent's claim that a criminal on death row is obligated to escape if he can, for it is his duty to preserve his life if he can (without injuring anyone else). See Tierney, "*Quaestio* of Henry of Ghent," 65 and n. 44, for text and discussion (repr. in Tierney, *Idea of Natural Rights*, 78–89). There is a related discussion in Doyle, "Two Thomists."

It thus seems that all acts of use which include an *usus iuris* are legally licit. And uses of natural, divine, and civil *ius* seem to correspond, vaguely, to the first three *communitates* Michael borrowed from Bonaventure.[79] John's insistence on the importance of a *ius utendi* belongs far down one of these branches. For *usus facti* to be licit outside of cases of extreme need or things which pertain in common to the entire *congregatio fidelium*, one also needs a *licentia utendi*. This licence is not a *ius*, for the granter of the licence still exercises all aspects of ownership over the thing, permitting it to be used only in specific ways; he also remains responsible for taking legal action to defend or sue for it.

### 3. *Francis of Marchia*

Francis also thought the pope's definition of *usus* was overly narrow. His was only one possible meaning, and not even the most commonly accepted one at that; it was, rather, Michael of Cesena who correctly described the term. Ockham would report this idea with approval in his own text. Francis made the same point that Michael had made: that the definition of use as "ius utendi rebus alienis, salua rerum substantia" is not the a universal, but particular definition of use. Thus, it is only according to this particular definition that we can say "usus proprie dictus" may not be found in temporal things.[80] That this had to be true was evident from the word *alienis*, for it is often the case that we use our own things, rather than someone else's.[81]

Francis, like the other Michaelists, rejected the pope's definition in *Ad conditorem*[2] because "he speaks about use according to what the laws say" (*loquitur de usu secundum quod leges loquuntur*), which had as an additional consequence that his account of *ius utendi* was also dictated by a civil law understanding as well.[82] Although the civil law definition was not a bad thing in itself, Francis found the stipulation that the substance had to be preserved too limiting. What the pope's definition meant in practice was that all *usus* had to be either *ususfructus* or *ius utendi*.[83] In a distinctive phrase, Francis wrote that the pope was only concerned to talk about a habitual

[79] Presumably, although a "use of divine right" may be licit by divine *ius*, this does not automatically mean that it is licit by another law. It is licit only in the sense that it is permitted, not commanded.

[80] *Improbatio* 26 (60); see p. 180, above.

[81] *Improbatio* 27 (60–61). Michael also made this point.

[82] *Improbatio* 740 (334).

[83] *Improbatio* 576 (282).

or virtual use (*usus habitualis, inmo uirtualis*), not about actual use (*usus actualis*)—and the latter is certainly no less a "use properly so-called."[84]

When St Paul used *uti*, for example,[85] it was clear that he was using the term *naturaliter* rather than *moraliter*, which was in response to the pope's predilection to use *abusus* or *abuti* to refer to the use of consumables. This use was natural in that the wine was to be used for a natural reason rather than a moral one.[86] In general, Scripture uses *usus* and *uti* to refer to a sustaining use of nature (*usus substentatiuus nature*), which is natural to man, and which is not necessarily connected to ethical considerations. The implication is that both *abusus* (which, according to Augustine, is "usus illicitus"[87]—and linked by the pope to consumption), and *usus* (as a *ius utendi*) are not free from these same considerations.

Before turning to the constructive aspects of Francis's theory of *usus*, a little more must be said about the term as a legal term. The pope, in defending his earlier use of *usus* in *Ad conditorem*, wrote that he meant to speak of *usus* and *uti* "secundum quod usus diuiditur contra proprietatem et dominium et usumfructum et ius utendi secundum decretalem illam *Exiit*."[88] But if this were true, Francis asked, how could he then define use explicitly in terms of a right of using?[89]

The conclusion is clear: despite John's protestations to the contrary, he did not, just as "the laws" (*leges*) do not, take *usus* and *uti* as divided against the other categories mentioned in *Exiit*.[90] *Exiit*, of course, does take *usus*

[84] *Improbatio* 27 (60); also unique to Francis, was the additional claim in this paragraph that a *ius utendi* "non dicit actum, set principium actus," which was another method for distinguishing use of fact as an act from the right of using, which was an (abstract) right.

[85] 1 Tim. 5:23: "noli adhuc aquam bibere sed vino modico utere propter stomachum tuum et frequentes tuas infirmitates."

[86] For John's text, see *Improbatio* 636–637 (302). Francis's refutation: *Improbatio* 640 (303).

[87] Augustine, *De doctrina christiana* 1.4.4, in Martin, *Augustini de doctrina christiana* [*et*] *de vera religione*, 8: "Frui est enim amore inhaerere alicui rei propter seipsam. Uti autem, quod in usum venerit ad id quod amas obtinendum referre, si tamen amandum est. Nam usus illicitus abusus potius vel abusio nominandus est." See also *De civitate Dei* 11.25, in Dombart and Kalb, *Augustini de civitate Dei* 2:344–45, and *De Trinitate* 10.11.17, in Mountain, *Augustini de trinitate*, 330.

[88] *Improbatio* 563 (275–76): "according to which use is divided against ownership, lordship, usufruct, and a right of using according to the decretal, *Exiit*." John was referring to where Nicholas III wrote: "Nam quum in rebus temporalibus sit considerare praecipuum proprietatem, possessionem, usumfructum, ius utendi, et simplicem facti usum" (*Exiit*, 2:1113).

[89] *Improbatio* 568 (277); see further 570–574 (278–79).

[90] *Improbatio* 602 (290).

as divided against the other four *consideranda*; and the reason for this is equally clear: Nicholas's decretal takes use "pro simplici usu facti."[91]

### 3.1. *Usus iuris*

Francis did not deal well with the term *usus iuris*. Perhaps that was partly because he was not certain if John thought that a *usus iuris* was a synonym for *ius utendi*; he did understand, however, that the pope used *usus iuris* to mean the exercise of a right or a servitude, especially since he described *usus* as a personal servitude.[92] In general, it seems that Francis did not fully grasp the technical, legal meaning of these terms, but even if he had, we can guess that his response would be to dismiss legal definitions as too limited and not the common or normal meaning. Instead, his overriding goal in dealing with any term that included the word "usus" in it was to emphasize that this, in at least one sense of the term, had to refer to an act of using:

> quia sicut ususfructus accipitur dupliciter: uno modo pro usufructu, alio modo pro iure percipiendi fructus, similiter usus iuris dupliciter accipitur: uel pro actu utendi iuris, uel pro ipso iure utendi.[93]

A *usus iuris*, then, can be broken down into an act of using of right and the right of using. But a right of using is essential to a *usus iuris*, for, as he wrote elsewhere, in a use of right there is no use of right without a right of using.[94] Beyond this, though, Francis did not see much value in explaining what a use of right was, not least because he felt this use of right excluded from itself ownership and lordship, which clearly proved that it could not be the proper definition of the term use.[95]

One other point deserves mentioning. During one of his many expositions of *Dilectissimis*, Francis mentioned that there existed a *usus iuris naturalis* in the state of innocence, which was at least as common to all humankind as lordship was because there was then a sharing (*communio*) of things with respect to a use of natural right.[96] This seems a valuable clue as to what

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[91] *Improbatio* 603 (290); for similar arguments, see 676–678 (315–16) and 705 (324).

[92] See above, p. 51.

[93] *Improbatio* 154 (111): "for, just as usufruct is taken in two ways—in one way for usufruct, in another way for the right of receiving the fruits—so a use of right is taken in two ways: either for the act of using of right, or for the right of using itself."

[94] *Improbatio* 88 (86): "ergo usu iuris, et usus iuris non est absque alico iure utendi."

[95] *Improbatio* 653 (306).

[96] *Improbatio* 261 (155): "Et ita usus iuris naturalis fuisset communis omnibus hominibus magis quam dominium uel eque, quia usus iuris erat magis intentus propter se in suo ordine quam dominium … et prius erat communio rerum quoad usum iuris naturalis.…"

Michael meant by this term in his writings. (Unfortunately, Francis never mentioned the idea again.) That is, as I suggested earlier, in the state of nature there was a natural use of right without human lordship, which was thus grounded in natural law.

### 3.2. *Ius utendi*

The Michaelists were concerned to draw a firm distinction between their simple use of fact and any positive law based right of using. As Francis (following the pope) liked to put it, the former *diuiditur contra* the latter. However, Francis had a rather unique account of the Franciscans' relationship with the *ius utendi*, which sometimes seems to derive more from his desire to refute the pope on each and every point than to construct a viable alternative account of the theory of Franciscan poverty.

On the issue of a right of using, then, it will come as no surprise that Francis found the scope of John's definition too limited. Again we read that, the pope's definition of *ius utendi* turns out to be taken "particularly and not universally." Francis's circular proof was to refer the reader back an earlier passage of the text, which turns out to be the proof that John's definition of *usus* (as we have seen) is particular and not universal.[97]

Much the same could be said of Francis's contention that the pope was mis-representing his position by maintaining that a *ius utendi* was not a *ius agendi*. According to Francis, *Ad conditorem* dealt with a "litigious and contentious" (*litigioso et contentioso*) right of using.[98] To prove this point, though, he quoted John's rough quotation of the *Sachsenhausen Appeal* of 1324 in *Quia quorundam*.[99] In this appeal Louis the Bavarian had claimed that people were more just and perfect, more acceptable to God and a good example to the world, "quanto plenius renunciatum fuerit omni iuri per quod potest sic utens pro usu huiusmodi quomodolibet contendere uel in iudicio litigare."[100] John naturally denied that the *Sachsenhausen Appeal* made any sense on this point, but one of the axes on which the Michaelist case turned was that the pope, whether he wanted to or not,[101] had to admit

[97] *Improbatio* 149 (110). It is no more convincing an argument when he went on to say that "tamen in talibus [i.e., consumables] proprie reperitur ius utendi et diffinitio iuris assignata a sanctis et fundata in scriptura," but without citing any examples.

[98] *Improbatio* 721 (329).

[99] See *Improbatio* 722 (329); *QQM* 255–262 (278–79).

[100] *App. Sachs.*, 150: "by how much more fully every right (through which the user can thus somehow contend or litigate in court for such a use) will have been renounced."

[101] This is the force of *Improbatio* 726–730 (330–32).

that a *ius utendi* also entailed a *ius agendi*. This meant, in turn, that the pope had to be speaking "de iure ciuili et mundano."[102]

Francis went on to give a fuller description of the types of *iura utendi*. His account here is unique, and certainly one which Ockham chose not to discuss as one of the opinions of the *impugnatores*. According to Francis a right of using temporal goods may be either a *ius utendi temporaliter* or a *ius utendi spiritualiter*.[103] For lack of better evidence, it seems that we may assume these two types of *ius utendi* correspond with the "particular" and "universal" forms he described. The pope's *ius utendi* is particular because it is only the right of using temporally, which is a right particular to positive law. The other right of using is universal because it is not so limited, and in fact must be present in every licit act. Another important difference between the two is that it is also a right that is common to all, unlike temporal rights of using, which are limited to discrete groups or individuals.

Francis based the *ius* of using spiritually on 2 Corinthians 6:10, where St Paul wrote (and Francis then glossed), "'tanquam nichil habentes et omnia possidentes. Tamquam nichil'—scilicet temporaliter—'et omnia possidentes' spiritualiter, quo iure utendi 'omnia sunt iustorum.'"[104] As Mariani noted, the last quotation probably derives from C. 23 q. 7 c. 1, which Francis cited elsewhere via John.[105] Augustine explained in this *capitulum* that things cannot be rightly (*recte*) possessed by anybody "except by divine right, whereby all things belong to the just, or by human right" (*nisi uel iure diuino, quo cunta iustorum sunt, uel iure humano*).[106] This spiritual right of using, then, is one that derives from divine law.[107]

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[102] *Improbatio* 738 (333–34). And if not, he added (738–739 [334]), then that other right of using, which does not demand that the substance be preserved, will be able to be separated from ownership and lordship in consumables—for that was the sole reason for their inseparability. And, finally, there is never any mention of *ius utendi* in divine law, nor the authorities of divine law. This last seems a bit strange, for we just saw (p. 197) that there was a *usus iuris naturalis* in the state of nature.

[103] *Improbatio* 759–760 (341–42).

[104] *Improbatio* 760 (342): "'as having nothing and possessing all things': 'as nothing,' namely temporally; 'and possessing all things,' spiritually, by what right of using 'all things belong to the just.'"

[105] *Improbatio* 851 (371), and 857 (372); see above, p. 44 n. 79.

[106] *Improbatio* 857 (372). Although I usually prefer to translate *ius* by 'law' in this passage, the explicit connection of this idea to the *ius utendi spiritualiter* would obscure the connection of these two ideas. I take this as further evidence that these texts tend not to draw as firm a distinction between 'law' and 'right' as English does.

[107] If further proof were needed, Francis himself related his discussion of this spiritual right of using to the pope's references to the divine and human law distinction drawn in D. 1

This is, moreover, the means by which Francis answered John's charge that licit use must be just use, which must mean, in turn, that one must have a right of using. His argument takes two steps, first to show that this spiritual right is not one that belongs either to a person or a community in a disjunctive fashion. As he wrote, because this right of using spiritually "est ius mere equitatis et congruitatis,"

> non diuiditur per proprium et commune, et quoad tale ius utendi unus homo non impedit alium hominem, quia eadem res numero potest immediate subiacere iuri utendi omnium iustorum.…[108]

All just people, then, can equally share in a right of using spiritually. The second step in Francis's argument was to argue that a *licencia utendi* included this type of a *ius utendi*—and that Michael's *Appeal* never denied this fact, but "expressly insinuated" it.[109] Francis seems to have in mind Michael's belief that everyone has, naturally, a *facultas utendi*.

We shall turn momentarily to examine Francis's understanding of the *licentia utendi*, but first we must provide an account of what he meant by "a right of using temporally," which he also described as a civil or canon law right of using.[110] Not surprisingly, a right of using temporally is a right founded in positive law; and this is the right of using under debate by the pope and the Michaelists.[111] A right of using temporally must be either "proprium" or "commune" because a thing the same in number cannot be perfectly and immediately subject to several different people's *ius utendi* at the same time.[112]

Historically speaking, neither Adam and Eve in the state of innocence nor Christ and the apostles in the early Church had a right of using temporally. The prelapsarian situation of man was not without a *ius utendi* of course, but it was of a special kind. In the first place, although Francis was not certain that it was merely tantamount to a common and undivided *potestas*

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c. 1; for John's text, see *Improbatio* 753 (339).

[108] *Improbatio* 760 (342): "because it is a right of pure equity and harmony, it is not divided by exclusive and common, and with respect to such a right of using, one man does not impede another one because a thing numerically the same can immediately be subject to a right of using of all the just.…"

[109] *Improbatio* 761 (342).

[110] *Improbatio* 762 (342): "sed questio fuit utrum usus rerum temporalium iustus et licitus possit separari a iure utendi temporali ipsarum, ciuili uel canonico, et non a iure utendi spirituali.…"

[111] *Improbatio* 762–763 (342–43).

[112] *Improbatio* 759 (341).

*utendi*, the prelapsarian *ius utendi* was definitely common to all and proper to none.[113] In the case of the early Church, Francis is careful to claim that the apostles had no "ius utendi ciuile et mundanum in speciali nec in communi," in terms of their own particular community. The argument moves along the same lines as in his account of the apostles' lack of lordship and ownership. As he concluded, from their lack of a right of using with respect to their sub-community, "tamen non sequitur quin potuerint habere aliquod ius in communi quantum ad communitatem generalem credencium, quia aliquid licuit eis in communitate credencium quod non licuit eis in communitate propria."[114] In other words, and it is interesting that Francis avoided phrasing it this way, as members of the general Church, it is not impossible that the apostles could share in the common *ius utendi* as it was held by all members of that community. But what must be remembered is that this right of using was surely the *ius utendi spiritualiter*, a right common to all, proper to none, and which derived from divine law.

### 3.3. *Licentia utendi*

Francis insisted that a licence was not a right: a licence to use was not a right of using. This was a point all Michaelists agreed upon; yet Francis argued for this claim in his own way. The argument begins negatively. If, as the pope has argued, a licence of using does not differ from a right of using,[115] then,

> quociens religiosus aliquis habet in speciali licenciam utendi alica re usu consumptibili, tociens habet in speciali ius utendi illa re, quia in indifferentibus habens in speciali unum, habet in speciali et reliquum, et ius utendi rei usu consumptibilis non separatur a proprietate et dominio, secundum ipsum:[116] ergo quociens religiosus aliquis habet in speciali licenciam utendi aliqua re usu consumptibili, totiens in speciali efficitur proprietarius in ea, et cum nullus religiosus utatur rebus usu consumptibilibus licite nisi de licencia suorum superiorum, sequitur quod omnes religiosi in omnibus rebus usu consumpti-

[113] *Improbatio* 260 (154), commenting on *Dilectissimis*: "quia in statu innocencie fuissent omnia communia omnibus, non solum quoad dominium rerum, set etiam quoad usum, siue iuris siue facti: quoad usum iuris quia ius utendi quodcunque eis conueniens fuisset commune omnibus et nulli proprium. Ideo, sicut primis parentibus fuit traditum dominium commune et indiuisum omnium inferiorum, ita fuit eis tradita postestas utendi omnibus alimentis communis et indiuisa, ut patet *Genesis* 1:29–30."

[114] *Improbatio* 164–165 (115): "yet, it does not follow that they could not have some right in common as far as the general community of believers is concerned, for something was licit for them in the community of believers that was not licit for them in their own community."

[115] See above, p. 59.

[116] E.g., *Improbatio* 6 (49), quoting John: "in rebus talibus, uidelicet usu consumptibilibus, ius utendi separatum a proprietate seu dominio nequeat constitui seu haberi."

> bilibus eis in speciali concessis, sint in speciali proprietarii: quod est contra omnem religionem habentem uotum paupertatis annexum.[117]

According to Francis, then, since religious who have vowed themselves to poverty only consume goods at the licence of their superiors, John's argument would equate an individual licence of using with an individual right of using, which was inseparable from ownership and lordship—and this would in effect make every individual religious (i.e., not just Franciscans) individual property-holders.[118]

Another problem with John's argument is that Francis believed that a licence of using the things conceded to the brothers existed individually for each friar according to their individual needs,[119] while the pope had insisted in *Quia quorundam* that he had clearly said that a right of using "exists for the community of the brothers" (*communitatis fratrum existit*).[120] This is also why Francis insisted that a temporal right of using was always exclusive (*proprium*), but that it was exclusive to either a specific person or a specific community.[121] Thus, Francis concluded, even according to John's own premises, the licence of using and right of using must be different.[122]

Francis's *licentia utendi* was a development from his account of the twofold nature of the *ius utendi*.[123] There are two different licences of using: There is a *licentia iuris*, which is given "secundum formam et apicem iuris," is non-revocable, and does not depend on the will of the granter; this is the

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[117] *Improbatio* 755 (339–40): "whenever some religious has an individual licence of using some thing consumable by use, he has an individual right of using that thing, for, in indifferents, he who has the one individually has the remainder individually. And a right of using a thing consumable by use is not separated from ownership and lordship, according to him [John]; therefore whenever some religious has an individual licence of using some thing consumable by use, he is made an individual property-holder of it. And since no religious uses things consumable by use licitly except by a licence of his superiors, it follows that all religious would be individual property-holders of all things consumable by use individually granted to them—which is against every religion that has an attached vow of poverty."

[118] Francis probably used "proprietarius" in this general sense, and not to stress the contrast to another person who has a *ius in re aliena* (e.g., usufruct) to the same property; see the entry in Berger, "Encyclopedic Dictionary," s.v. "dominus proprietatis" (442).

[119] *Improbatio* 756 (340): "set licencia utendi rebus fratribus concessis existit in speciali fratrum singulorum secundum specialem indigentiam eorum,"

[120] *Improbatio* 716 (328). John never used precisely those words in the bull, but see *QQM* 119–121 (267); and 209–254 (274–78), in general (discussed above in part on pp. 52 and 57).

[121] Above, p. 113.

[122] *Improbatio* 756 (340).

[123] See above, p. 199.

type of licence John was describing in *Quia vir*.[124] The other type of licence is a *licentia simplex facti*, which depends solely on the will of the granter, and can be revoked whenever it pleases him. This was the one *Exiit* and Michael's appeal described, for the decretal expressly says "durante licencia concedentis."[125]

It is not clear that these two types of licences can be incorporated into the hierarchical picture Francis described for the *ius utendi*. Clearly we should consider the "simple licence of fact" to be the one he described in the following words: "Et quoad istud ius utendi spiritualiter, *Appellatio* non negat quin licencia utendi tale ius utendi includat."[126] It thus seems as though the two terms are related; however, he does not properly relate the licence of right of using to the right of using temporally, which John allegedly described in *Ad conditorem* and *Quia quorundam*. Because licences, according to Francis, can only belong to individuals,[127] my suspicion is that this "licence of right" should be considered a sub-type of the "proper right of using temporally."

However, this account is unsatisfactory, for it does not specify the important point that this "simple licence" is one granted by someone else. The point was instead that, in normal circumstances, once this licence was granted, it could justify the "right of using spiritually," which was founded in a non-positive source of *ius*, and it would thereby become an active ingredient in making the use of a thing licit—provided, of course, one does not violate the terms of the licence.

Francis's argument differed from Ockham's here in three ways. First, in his analysis of the difference between a licence and a right, his focus remained only on the licence of using. Second, this analysis relied primarily on the assertion that a licence of using existed with respect to individuals more than to a community, while agreeing with the pope that a right of using applied more to a community than to individuals, in order to prove that a licence and a right were different.[128] Ockham, in contrast would offer a richer account of what a licence was and how it worked. The last difference is the most important. For while Ockham's version would be useful for maintaining the Franciscan desire to use goods licitly without any connected property rights, Francis's account of the licence is ultimately useless for this goal. The reason

[124] *Improbatio* 767 (343–44), referring back to *Improbatio* 749 (337).

[125] *Improbatio* 768 (344).

[126] *Improbatio* 761 (342): "And with respect to that right of using spiritually, the *Appeal* does not deny except that a licence of using includes such a right of using."

[127] *Improbatio* 756–757 (340–41).

[128] This is especially clear in *Improbatio* 757 (340–41).

is not hard to see. In Francis's account, Franciscans, like other religious, use things at the licence of their superiors (and according to their individual need). While this was the received wisdom of how individual Franciscans used things,[129] it does not really answer the problem. For example, it is not clear why superiors of the order could grant these licences since they, too, should not have *aliquid iuris* to the goods the friars may use. Why, in short, could ministers of the order grant such licences when they themselves had no *ius* to the things in question? The purpose of the licence, as Ockham well understood, was not to work within the order, but from the donors to the individuals of the order: only the real owners could grant a licence of using that meant anything.

### 3.4. *Usus facti*

*Usus facti* also has two meanings; one refers to the act and the other to an abstract counterpart. Part of the pope's problem was that he did not realize that both Nicholas III and Clement V used the term in both senses without clearly mentioning this fact.[130] Francis described the abstract portion of a use of fact as either a *potestas* or a *facultas*, which he seems to have treated as synonymous. At one point he described "usus actualis facti" as an "act of using and power of using without interference" (*actus utendi et potestas utendi absolute*).[131] Earlier in the *Improbatio* he described this double nature so:

> Consimiliter usus facti simplex dupliciter accipitur: uno modo pro simplici actu utendi, alio modo pro simplici facultate utendi. Esto autem salua rei ueritate quod simplex actus utendi "sic sit utentis proprius quod non possit esse alterius nec alteri communicabilis," tamen simplex facultas utendi bene potest esse communis pluribus sicut et ipsum ius utendi.[132]

Thus, even if John was right to say that an *act* of using cannot be shared, a *faculty* of using can be shared amongst many people—for it is merely the

[129] Cf. the more restrained use of this point in *App. maior*, 288–89; discussed above, p. 189.

[130] *Improbatio* 155 (111–12); cf. 702 (323).

[131] *Improbatio* 632 (301). This is not the same *potestas utendi* found in the prelapsarian state of nature; see *Improbatio* 260 (154) and 263 (155).

[132] *Improbatio* 154 (111): "Similarly, simple use of fact is taken in two ways: in one way for the simple act of using, in another way for the simple faculty of using. Now, with the truth preserved, grant that a simple act of using 'is so exclusive to a user that it cannot be another's or shared with another'; even so, a simple faculty of using can well be common to many, just as the right of using itself can be." The quotation refers back to John's words at *Improbatio* 145 (108).

foundation (*principium*) of a simple act.[133] In fact, in response to the pope's claim that *facta* (here in the sense of acts of using) require real people, not "imaginary or represented" people like an *ordo*,[134] Francis noted that even if use of fact *qua* the act of using cannot, per se, belong to a community—and Francis had his doubts about this—, use of fact *qua* the faculty can well belong to a community; nor, he added, does it need a "true" person any more than it needs a *ius utendi*. And just in case one doubts whether this so-called faculty is anything other than a *facultas iuris*, Francis immediately pointed out that

> talis facultas simplex est quedam facultas media et innominata proprio nomine supra facultatem nature omnibus communem et infra facultatem iuris proprie dicti consituta, licet largo nomine posset dici simplex facultas iuris.[135]

That is, this unspecified faculty of using exists precisely in the region between our common faculty of nature and a faculty of right. Francis was thus trying to make a point similar to one Ockham would later explain more clearly: that the scope of positive law (as legislated) does not cover the full range of possible human actions, and that natural law did not prescribe one's actions in all these other situations (i.e., it forbade some, promoted others, and remained indifferent for the rest).

Splitting *usus facti* into the components of act and faculty provided the means by which Francis was able to argue that a specific community or order could be granted a use of fact rather than of right, but his poverty theory still needed to account for its general separability from lordship or ownership. The *Doctor Succinctus* did not neglect this subject. His first argument focused on thinking about the separability of personal use from personal ownership, much like the situation described in Acts 4:32–35, or of contemporary monastic practice.[136] Even John himself, Francis said, could not deny that, before the division of their goods, the first believers

[133] *Improbatio* 155 (112).

[134] See above, p. 52.

[135] *Improbatio* 156 (112): "such a simple faculty is a certain mediate and unnamed faculty established above the faculty of nature common to all and below the faculty of right (properly called), although it could broadly be called a simple faculty of right." This distinction is important to bear in mind in other passages where he seems to have divided simple use of fact into the act and power of using, then refer to these two as an "actus utendi" and a "ius talem actum exercendi"; see, e.g., *Improbatio* 632 (301), where it is said that any civil laws that deny this division are not to be listened to against divine *ius*, which admits it.

[136] See, e.g., his discussion of the Augustinian Hermits in *Improbatio* 346 (190): "Item,

> habebant usum talium separatum a proprietate et dominio speciali, quoniam ante diuisionem illam rerum, nullus eorum habuit in speciali proprietatem alicuius rei, set erant eis omnia communia; et tamen quilibet ipsorum, ante diuisionem illarum rerum, habebat in speciali usum earum quia ante diuisionem earum quilibet ipsorum comedebat et bibebat de hiis que possidebat. Et ita usus talium, ante diuisionem, fuit separatus de facto a proprietate et dominio singulorum in speciali, set qua ratione fuit separatus de facto ante diuisionem, eadem ratione fuit separabilis de possibili post diuisionem sicut ante.[137]

Francis's conclusion here is characteristic of his *Improbatio*: it is not only a question of what happens in fact, but also one of possibility. Since use was separable before the division of goods, then by what reason it was separate at that time, by the same reason it is possibly separable after the division.

Paired with his belief that the "nature of things" had not changed between then and now, the *de possibili* / *de facto* distinction was crucial for Francis, just as he had made extensive use of *de possibili* arguments (without a *de facto* counterpart) when dealing with the problem of future contingents.[138] These two premises lead to the following explanation:

> ubi est eadem rerum natura, ibi usus uniformiter est separabilis uel inseparabilis de possibili a proprietate et dominio, licet non sit uniformiter separatus de facto; set natura rerum usu consumptibilium est eadem genere et specie substantialiter et accidentaliter, in speciali et in communi; et dominium commune talium rerum ita consumitur per usum earum, sicut consumitur dominium speciale et proprium, et sub usu istarum rerum non magis saluatur dominium commune quam proprium.[139]

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fratres ordinis sancti Augustini non debent habere in speciali proprietatem alicuius rei usu consumptibilis nec non consumptibilis.… Set fratres beati Augustini habent in speciali usum rerum usu consumptibilium … ergo dicti fratres habent in speciali usum rerum usu consumptibilium separatum a proprietate et dominio speciali."

[137] *Improbatio* 76 (81–82): "had a use of such things separated from individual ownership and lordship since, before that division of things, none of them had individual ownership of any thing, but all things were common to them; and yet each one of them had, before the division of those things, individual use of them: for, before their division, each one of them ate and drank from the things which he possessed. And thus, a use of such things, before the division, was individually separate de facto from the ownership and lordship of individuals; but, by the reason it was de facto separate before the division, it was possibly separable after the division just as it was before." *Improbatio* 77 (82), relates this idea to monastic practice. To argue otherwise (that use is absolutely inseparable from ownership and lordship), of course, would destroy the foundation of all *religiones* which have a vow of of abdicating personal ownership of temporal goods; see also 177 (119).

[138] See Schabel, "Francis of Marchia," § 2 [last accessed 2011 10 10].

[139] *Improbatio* 178 (120): "where the nature of things is the same, there one is possibly uniformly separable or inseparable from ownership and lordship, although it is not uniformly

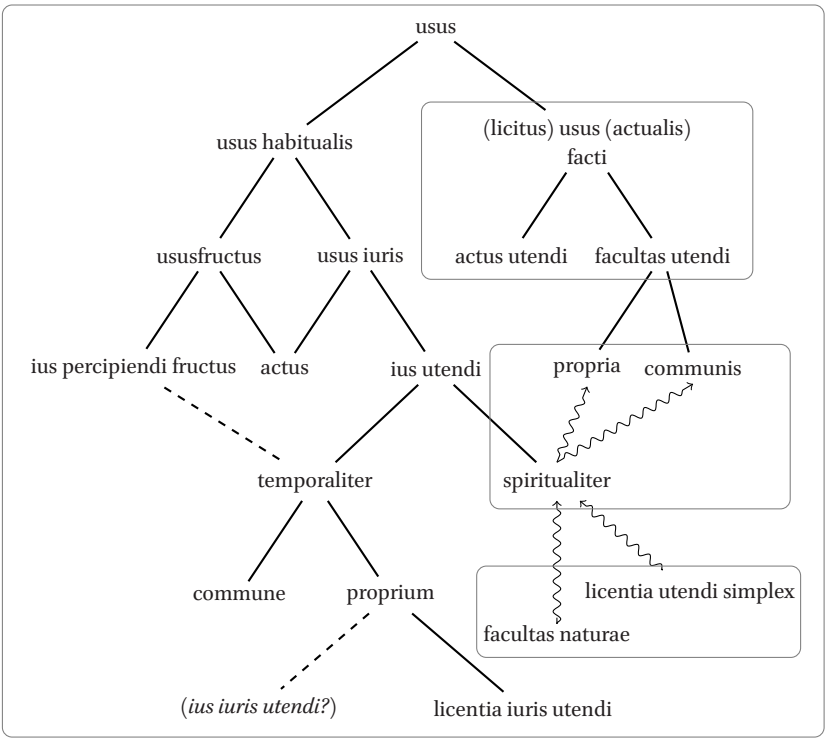


Figure 5.2: Francis of Marchia on *usus*

Francis built upon this point in two ways when he considered the special case of consumables, which we shall examine in the next chapter.[140]

### 3.5. *Preliminary Conclusions*

It is not easy to follow Francis's myriad of distinctions and terms when it comes to *usus*. Figure 5.2 represents an attempt to sketch how he understood the term. Part of the confusion seems to stem from the fact that he insisted

separated in fact. But the nature of things consumable by use is the same in genus and species, substantially and accidentally, individually and in common. And a common lordship of such things is consumed through their use in the same way as special and exclusive lordship is consumed, and under a use of those things a common lordship is not more preserved than an exclusive one is."

[140] See p. 241, below.

that every type of *usus* can be broken down into two main components: the act itself and the abstract component that legitimates or brings about the action. Thus, the biggest division is between "actual" and "habitual" use, which he also referred to as using *naturaliter* or *moraliter*. However, because he insisted that that even things like usufruct or another use of right decompose into the actual right and the act, it seems that we must include them on the "using morally" side as well. Every *usus* includes both the action and the foundation (*principium*) for that action.[141]

The diagram exaggerates this to some extent, but Francis's account of *usus* puts the *ius utendi* at centre stage.[142] Some form of a *ius utendi* accompanies every licit act of using. There is the right of using *temporaliter*, which is the sort of right John had meant in his bulls. These are rights of using based on positive human law. He spoke at one point of it belonging to the *ius civile* or *ius canonicum*. The *facultas iuris* is related to this sort of right. If we can say that *facultas utendi* refers to the ability to use something, then the *facultas iuris*, which is 'above' the other faculties must be a legal ability to use something; it is, essentially, a *ius utendi*. We must locate the *licentia iuris*—a non-revocable licence that does not remain under the control of the one who initially granted it—under this branch as well. It is not clear how this would differ from a regular, as it were, right of using, which I have called a *ius iuris utendi* for lack of a better term. Perhaps Francis was willing to imagine that the licence of a superior for a monk to enter a different, stricter religious order counted as a licence, but fell below a full-blown right.

There is also the right of using *spiritualiter*, which is much more difficult to nail down. At the very least it is a *ius equitatis*: common to all and proper to none. There is the *facultas nature*, common to all and 'lowest' of the faculties. Presumably this faculty is the one that applies in extreme circumstances, such as imminent and manifest need, or where it is not a human positive law issue. Although Francis never made this point, his breakdown of *usus* clearly allows the possibility for a person to use a *res nullius* without acquiring any rights to that use since the acquisition of these sorts of rights depend upon the will.[143] It would have been convenient if Francis had named a

[141] This is partially obscured where *ususfructus* and *usus iuris* both point to the same *actus*. It is drawn this way only to make the diagram fit the margins, although presumably every act of using is generically the same in Francis's scheme.

[142] I find it doubtful that Francis really thought usufruct did not fall under the category of *usus iuris*, but he never actually made that claim, he only compared the two analogically. I have therefore deliberately drawn them as distinct branches of *usus habitualis*.

[143] See the discussion starting on p. 149, above.

corresponding 'licence of nature' to go with this faculty, but he did not. I suppose this means that his *facultas nature* corresponds either to our natural ability to use in the sense of native or innate, or to an ability to use based in *ius naturale*, which would then be related to the *usus iuris naturalis*; it possibly even meant both.

The crucial licence for the Franciscans was the *licentia simplex*. An owner could grant a simple licence of using to someone else, which would thus allow that person to deploy licitly his or her *facultas utendi*. In a narrow sense this is an "unnamed" sort of licence, although in a looser sense we can call it a *simplex licentia iuris*. It is *iuris* because it falls under the spiritual right of using, and this is why Francis wrote that a licence of using is said to include a *ius utendi*. The faculty of using could even be common to a group. Francis did not explain how this worked, but maybe it could be explained in this way. If someone gave a simple licence to use a specific thing to a group, each member of the group *qua* a member would be able to employ, licitly, his faculty of using; conversely, non-members would not be able to use licitly that same thing.

## 4. *William of Ockham*

Ockham generally followed the standard Michaelist line that the pope's argumentation relied on the "semantical ambiguity of the term 'usus.'"[144] Ockham agreed that *usus* could refer to both the act of using and a right of action, but these were only two of the four basic meanings *usus* had. Although Ockham conceded that the term might be used in other ways, these were the four he named:[145] (1) Use can be meant as distinguished from *fruitio*, where both are acts of the will whereby something is taken up into the faculty of the will.[146] This is not a common meaning in legal discourse. (2) It might also refer to the act of using an eternal thing, which is the common meaning of the term.[147] (3) In a third case it might refer to the custom of doing something (*consuetudo aliquid faciendi*), what we might mean by "usage" today. (4) The last meaning Ockham mentioned was use as

[144] Lambertini, "*Usus* and *usura*," 204. On what follows, see now especially Miethke, "*Dominium*, *ius* und *lex*," 247–49.

[145] The following is based on *OND* 2.80–99 (1:300).

[146] See *Sent.* 1.1.1 (OTh 1:371–93), and p. 196 n. 87, above, for references to Augustine.

[147] Although Brett, *Liberty, Right and Nature*, 58, has argued that this constituted a redefinition on Ockham's part, he was actually following Michael's twofold definition in *App. maior*, 255–57.

a *ius speciale*, what he sometimes referred to as a *ius determinatum*; this is a common meaning of *usus* in legal discourse.

Only the second and fourth meanings of *usus* played an important role in Ockham's account of property rights. Of these two, use in the sense of the act of using is common across the sciences and is its *significatio propria*; a use as a *ius determinatum* is proper only to law and is thus a secondary meaning. That this was true was so well-known that Ockham claimed it needed no explicit demonstration.[148] Ockham's strategy here, as we have seen elsewhere, was to point out that John had confused the definitional hierarchy of this term. That is, the pope had limited the range of possible meanings to those which applied in law, but these do not exhaust the range of valid meanings *usus* can have.[149] If anything, Scripture should determine which meanings are acceptable or not. This twofold definition is important in another way as well, for it allowed Ockham to claim that *usus facti* did exist for consumables even though *usus iuris* might not.

Ockham treated the term *usuarius* in a similar way. Because the term *usuarius* is derived from *usus*, which in this context refers to a use of right or of fact, one can be a 'user' in two different ways.[150] Accordingly, one may be a *usuarius* because he has use of right; and if he has only bare use (of right), he may be called a *simplex usuarius*. The other type of user is called such because he only has use of fact; and, in this case, a simple user would be one who has use of fact because he lacks (*per carentiam*) all legally actionable rights—whether in his own name or the name of his college—for the thing or the use of fact of the thing.[151]

### 4.1. *Usus iuris*

The term "use of right" clearly suggests its juridical nature. By use of right people generally meant a "quoddam ius positivum determinatum, institutum ex ordinatione humana, quo quis habet licitam potestatem et auctoritatem uti rebus alienis, salva rerum substantia."[152] It was thus a key term for illus-

[148] *OND* 6.324–339 (1:363). *Actus utendi* is not a complicated term; in theology, moral philosophy, medicine, other common ways of speaking, and even in legal science, "actus comedendi, bibendi, et huiusmodi" are called "actus utendi et usus"; see 6.343–345 (1:363).

[149] Cf. Miethke, *Ockhams Weg*, 448.

[150] On the Roman law meaning of *usuarius* as a person who had the right of use over another person's thing or slave, see Berger, "Encyclopedic Dictionary," s.vv. "usuarius" (752) and "usus" (755).

[151] *OND* 2.217–235 (1:303–04).

[152] *OND* 2.127–130 (1:301): "a certain determinate positive right, established by a human

trating the limited nature of John's definition of *usus*. For example when the pope said that use, properly taken, cannot be had in consumables, Ockham's response was to say that he must have meant use of right, which is a legal term; it is, after all, well known that Scripture and other sciences regularly speak about using all kinds of consumables.[153] Use of right, according to Ockham, refers to either bare use of right or usufruct.[154] Ockham was clearly in command of the technical meaning of *ususfructus* and *usus nudus*.[155] He gave the standard definition for usufruct, namely, the right to use another's property as well as sell, grant, or rent his right to another. It was a thicker (*pinguius*) right than bare use, which is but a right of using in which the substance cannot be impaired and the right remains inalienable. The main point we must understand was that a use of right was a *ius quoddam* and never an act of using: *iuris* is meant to distinguish it from a use of fact.[156]

Incidentally, this distinction allows us to see how a use of right cannot be found in consumables. If use of right entails the preservation of the thing, consumables, which are consumed through use, cannot be used in that way.[157] However, although use of right, taken strictly and most properly, cannot be established or had (*haberi*) in consumables, this does not mean that a right of using cannot be had.[158] A right of using, after all, is merely the (legal) power to use a thing, it does not specify that the thing cannot be consumed (unless this right comes from a usufruct or bare use of right).

Perhaps the most questionable claim of Ockham's about the nature of use of right has to do with "necessary use": "usus necessarius non est usus iuris." Ockham's proof, as it were, was to point out that Franciscans and many others are sustained and fulfill their duties without any use of right. A use of right is simply not necessary for food, clothing, divine worship, or

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ordination, by which someone has a licit power and the authority to use another person's things, with the substance of things preserved."

[153] *QVR* 16.2–3 (2:442), and *OND* 16.54–62 (2:443–44), respectively.

[154] *OND* 62.200–203 (2;568): "Quia omnis usus iuris est usus nudus, vel ususfructus. Sed ordo Fratrum Minorum non habet usum nudum iuris in rebus, nec usumfructum; quia omnis habens talem usum potest pro usu rei in iudicio litigare. . . ."

[155] This whole passage is distinctly reminiscent of Inst. 2.5 pr.–2 (and 2.4 pr.), which was commonly cited on all sides. Offler (OPol 1:301) noted the echoes to Dig. 7.1.1, 7.1.12.2, 7.8.8, 7.8.12, but as these passages were neither cited by the others and are parallel to the citations from the *Institutiones*, I think we can doubt that Ockham had them in mind here; see also the discussion on p. 298, below.

[156] *OND* 2.127–154 (1:301–02).

[157] *OND* 6.400–403 (1:365).

[158] *OND* 3.537–542 (1:325).

study; use of fact is, however.[159] But this is not inconsistency on William's part. The words "of right" in this case have to do with civil law, not natural or divine law. Ockham, naturally, did agree that, in terms of natural law, the use of things like food are guaranteed by the law of nature. Ockham, like others of his day, believed that civil law has no legitimate force if it tries to debar a right that is grounded in a higher law.

### 4.2. *Ius utendi*

Ockham described both a natural right of using and a positive right of using.[160] Conceptually, these clearly correspond to Francis's rights of using spiritually or temporally. A natural right of using is common to all men, for it is held from nature and on her authority rather than a "supervening enactment" (*aliqua constitutione superveniente*). However, although everyone may have this right *at* every moment (*omni tempore*), no one has this *for* every moment (*pro omni tempore*). Someone who has no property, for example, cannot use another person's things except in a moment of extreme necessity.[161] This was not, of course, the right of using Nicholas referred to in *Exiit*, for Nicholas claimed that one could do without a right of using *in temporalibus*, but at the same time maintained that this did not preclude them from a means (*via*) for the sustenance of their nature by the *ius poli*.[162]

The situation is quite different with the positive right of using. This right is held by a human enactment or pact, and was the focus of his early chapters in the *Opus nonaginta dierum*. Ockham treated *ius utendi* as more or less synonymous with *usus iuris*. However, Ockham seems to reverse the relationship of the two terms compared to Michael:

> licet ius utendi communiter et tamen proprie sumptum communius sit quam usufructus et nudus usus, tamen stricte sumptum est idem quod nudus usus, et sic Nicholaus III in decretali *Exiit* videtur accipere ius utendi.[163]

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[159] *OND* 58.178–186 (2:552).

[160] *Impug.* § 26 (253) also describes a right of using that "non est servitus sed mere ius partiale" that can be found in consumables (priests of the Old Law had this sort of *ius utendi*). This rather strange term is not repeated elsewhere, but it does not sound like it belongs to the vocabulary of a jurist.

[161] *OND* 61.35–44 (2:559). It need hardly be said that this type of *ius naturale* cannot be renounced: 60.93–94 (2:556). The terminology here will remind one of Peter Olivi's distinction about *de presenti* and *pro presenti* necessity with respect to *usus pauper* in *QPE* 9.1229–51 (39–40), but that type of necessity is wholly different; see *QPE* 9.1161–72 (37–38), and Burr, *Olivi and Franciscan Poverty*, 68–70.

[162] *OND* 60.89–100 (2:556); cf. 6.151–154 (1:358), and *Exiit*, 2:1113.

[163] *OND* 6.278–281 (1:362): "although a right of using generally and yet properly is more

A right of using in its broader sense is commonly taken to be more general than usufruct or bare use, although in a stricter sense a right of using can mean bare use. The reason for Ockham's reversal of Michael's position has to do with the fact that in (true) bare use, neither the right of using nor the thing itself is alienable:

> Quamvis ergo omnis usus iuris sit ius utendi, non tamen omne ius utendi est usus iuris, qui distinguitur a proprietate et dominio; sed omne ius utendi rebus alienis, salva rerum substantia, est usus.[164]

In either a use of right or in lordship/ownership one will have a right of using, but a use of right is far from lordship; one always has *usus*, though, if one has a right of using.

The end result of Ockham's claim made no real difference to Michael's breakdown of *usus*: all uses of right, whether usufruct or bare use, necessarily include a right of using. Ockham's reversal of the terminology is understandable, but is ultimately cosmetic.

To have a right of using means that one has a "potestas licita utendi re extrinseca, qua quis sine culpa sua et absque causa rationabili privari non debet invitus; et si privatus fuerit, privantem poterit in iudicio convenire."[165] A right of using is primarily a licit power to use an external good of which the right-holder should not be deprived without fault of cause, just as is true for rights of lordship.[166] Anyone unjustly deprived of their right, he continued, can sue the depriver in court.[167] A final point to note is that Ockham cut out the part about a right of using being tied to the use of other people's things (*rebus alienis*). A right of using applied to all things over which one had some kind of *ius*, whether it be full ownership (*dominium*) or a fraction thereof.

The idea that one should not be deprived of his or her right(s) without cause was one that would become a cornerstone of his political thought in general. It is a noble sentiment, but Ockham originally only employed

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general than usufruct and bare use, nevertheless taken strictly it is the same as bare use, and so Nicholas III seems to have taken 'right of using' in the decretal *Exiit*." Cf. 3.94–101 (1:313).

[164] *OND* 2.181–184 (1:302–03): "Therefore, although every use of right is a right of using, nevertheless not every right of using is a use of right, which is distinguished from ownership and lordship; but every right of using another person's things, saving the substance, is use."

[165] *OND* 2.155–158 (1:302): "licit power of using an external thing, of which an unwilling person should not be deprived without fault and without reasonable cause; and if he were to be deprived, he would be able to sue the depriver in court." 61.46–50 (2:559), refers to it as "quaedam licita potestas exercendi actum aliquem circa rem temporalem extrinsecam."

[166] See, e.g., the example of Adam before the creation of Eve: *OND* 27.85–96 (2:488).

[167] *OND* 61.53–69 (2:559–60).

this idea instrumentally to show that he and his confreres did not have a right of using temporal goods. Ockham found this idea in some glosses to the *Decretales* and the *Decretum*; later on in his career he would provide further references.[168] Significantly, these references are not found in the earlier Michaelist tracts, though a similar idea can be found in Michael's *Appellatio monacensis*.[169]

Ockham seems to have realized that not everyone would agree with the Michaelist claim that all rights (of using) entailed a right to legal action. Privileges, after all, ought to be considered rights of a sort, but with this crucial difference: they may be revoked at the will of the one granting the privilege—"absque causa et sine culpa."[170] Ockham argued that the situation was not entirely the same. The reason for this has to do with the nature of the relationship of the granter of the privilege and the privilege itself. For just as a prince is not bound by his own laws,[171] neither is one bound by a privilege he or she granted; others, however, are morally bound to respect the privilege.[172] In other words, privileges are "rights" in relationship to everyone but the granter. But they cannot be considered real positive law rights since they are subject to the arbitrary actions of the true right-holder.[173] Ockham's discussion leads one to believe, moreover, that it would be the

[168] *Glos. ord.* ad X 1.2.2, s.v. "culpa caret"; *Glos. ord.* ad X 4.13.11, s.v. "sine sua"; *Glos. ord.* ad D. 22 c. 6, s.v. "priusquam." The subsequent references to Dig. 47.10.13.1 and 50.17.155.1 that Offler suggested, particularly the latter, are less convincing. See the discussion on p. 310, below.

[169] See above, p. 107.

[170] *OND* 61.71–75 (2:560); 61:155–157 (2:562). See also Gray, "Ockham on Trusts," 151–52. Ockham's position was not very in tune with juridical thought, though there was no firm consensus on the precise nature of privileges. A privilege was often thought of as a *concessio iuris* guaranteeing a particular situation, and the canonists of the twelfth and thirteenth centuries tended to see "dans le privilège une loi"; see Gaudemet, "Ambiguité du privilège," 56 and 53, who was dealing with the problematic difference between a privilege and a *ius singulare*. More generally, Pennington, "Interpretation of Privileges," 480, pleaded that the nature of privileges be subject to more attention.

[171] Dig. 1.3.31(30). Medieval jurists loved to discuss this claim; see especially Tierney, "'The Prince,'" and Pennington, *Prince and the Law*, 77–106.

[172] *OND* 61.78–88 (2:560). See also *AP* 7.41–43 (1:253–54), citing X 4.5.4: "unusquisque in traditione seu collatione sive donatione rei suae potest legem, quam vult, imponere, dummodo nichil imponat, quod sit lege superiori prohibitum"; and cf. *AP* 9.30–33 (1:258). Ockham subsequently related this idea to the mechanisms which govern donations to the Church, namely that the donor may impose whatever *lex* he or she so desires: *OND* 77.121–131 (2:626–27); cf. *CB* 6.4 (3:276.33–277.1); and *OQ* 1.15.18–23 (1:58).

[173] Tabarroni, "Francescanesimo," 220–23, has stressed that Franciscan political thought was generally influenced by the idea that political arrangements could be enacted through promises. However, these were not as fragile as those that governed Franciscan poverty.

responsibility of the right-holder, or someone acting in his name, rather than the enprivileged (as it were) to take legal action if a third-party interfered with the privilege.[174]

### 4.3. *Licentia utendi*

The reason Ockham mentioned privileges was not because he wanted to argue that the Minorites had such quasi-rights in the things they used, but to point out that it is in fact possible for someone to be denied a certain action without cause. A fortiori, the same can be true of a *licentia utendi*, for a licence is, legally speaking, even weaker.[175] Like a privilege, the latter sort of licences only exist *ad placitum concedentis*; where they differ, however, is that a licence confers no right. The purpose of a licence of using is to allow use, but with the possible inclusion of arbitrary conditions. That is, the duration of use is never fixed, but exists only as long as the granter of the licence wishes.[176] But while the licence lasts, the licencee may employ the most general natural power of using.[177] Ockham offered the standard example of poor guests invited to dinner: they have a licit power of using the food and drink placed before them, but only so long as the host wishes; and there is certainly no legal recourse if he changes his mind.[178]

Ockham related this idea to the concept of a *gratia*—an idea novel to him.[179] A grace confers a licit power of using, but the one granting such a grace can arbitrarily revoke this grace as he pleases without any danger of being called to court. Canonistic glosses are again the proof for Ockham's position: a bishop's *sumptus* is to be sought *ex gratia* rather than *ex iure*, and people elected to some position *de gratia* are not considered to have

[174] Cf. Kilcullen, "Origin of Property" 885 n. 10.

[175] A similar account to the one presented can be found at *Impug.* § 18 (250–51); but cf. the strange discription of the *licentia utendi* at *Impug.* § 4 (243).

[176] St Francis reflected this idea when he had all the brothers leave a hut because another man wished to stay there with his ass; see Thomas Celano, *Vita prima S. Francisci* 1.16.44 (AF, 10:34–35).

[177] See below, p. 221.

[178] *OND* 2.164–168 (1:302).

[179] We should probably relate this to his theological writings. See, e.g., *Sent.* 4.11 (OTh 7:213.8–11): "Ideo dico quod duplex est gratia: una est qualitas absoluta informans animam, alia est gratuita Dei voluntas. Primo modo loquendo de gratia, dico quod eadem est gratia gratum faciens et gratia virtutum et gratia sacramentalis cuiuscumque sacramenti." See the discussion in Baudry, *Lexique philosophique*, 105–06, and Wood, "Repudiation of Pelagianism." See now also the forthcoming article, Mäkinen, "Moral Psychological Aspects," 515–17.

obtained a *ius* or advantage. Simply put, there is a distinction to be drawn between *ius* and *gratia*.[180]

The idea is, of course, that just as grace is supererogatory in that it is certainly a good thing to receive, but not something one can count on receiving,[181] so are the Franciscans supposed to be in an equally precarious situation: they are meant to hope for, not expect or demand, the kindness of strangers.[182] As he succinctly explained, the privation of grace "potest esse sine culpa."[183]

Perhaps we should clarify that a licence *can* be a grace, for there are irrevocable licences. Ockham cited the example of a monk's licence from a religious superior to enter a different order.[184] In fact, he conceded that a some licences are *iura*; this is true when someone must not be deprived of such a licence without legitimate cause. Francis's *licentia iuris* was quite probably the source for this idea.[185] One example to which Ockham referred was Matthew 12:1, where Christ and his disciples went through the grainfields on the Sabbath, picking and eating the heads of the grain.[186] But a licence of using was different in that it permitted the licence-holder to use the thing in question: it did not imply any correlative duty on the part of others, particularly the owner(s), to refrain from arbitrarily revoking the licence at some point.[187]

One interesting result of this arrangement is that any licence which can be revoked by the granter by means of the *ius fori* should not be thought to be a part of the *ius fori*.[188] In turn, such licences cannot be said to be

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[180] *OND* 2.160–174 (1:302), citing *Glos. ord.* ad C. 10 q. 3 c. 7, s.v. "sumptus," and *Glos. ord.* ad X 1.5.4, s.v. "de gratia."

[181] Peter King first helped me understand the significance of this point. See also the perceptive comments of Baudry, "L'Ordre franciscain," 207–08.

[182] See, e.g., *Regula bullata* 6.1–6 (231–32), and especially *Regula non bullata* 7.13 (255) and 9.6 (259).

[183] *Sent.* 4.11 (OTh 7:195.14–15).

[184] *OND* 61.89–94 (2:560). In fact, Ockham might well have added that there are also "intermediate" licences, which are revocable with cause, e.g., the *licentia ubique docendi*. Cf. *Exiit*, 2:1119, about the *licentia praedicandi*: "quam quidem licentiam praefati ministri revocare et suspendere valeant et arctare, sicut et quando id eis videbitur expedire."

[185] Miethke, *Ockhams Weg*, 491 n. 221; see above, p. 202.

[186] See the discussion at *OND* 3.388–416 (1:321–322).

[187] As Tierney, "Hohfeld on Ockham," 370–74, wrote: "A license is merely a *permission* to do an act which *without such permission* would amount to a trespass" (italics Hohfeld's).

[188] *OND* 65.69–70 (2:574): "Ex quo sequitur ulterius quod licentia, quae iure fori potest a concedente ad placitum revocari, est de iure fori minime reputanda." Cf. Morrall, "Some Notes," 345.

actionable, which also explains why they cannot be considered rights.[189] This will be important to Ockham's account of Minorite poverty, for it allows for the friars to have various licences which exist 'outside of' the sphere of civil law.[190] In a sense it is rather a step 'below' in that the arrangement is meant to affect only the two individuals or groups (other than perhaps the others' duty to respect the existence of the licence).

### 4.4. *Usus facti*

The terms "use of fact" and "simple use of fact" were common by the time of the *Opus nonaginta dierum*. Nicholas had already divided Bonaventure's notion of *simplex usus* into *ius utendi* and *simplex facti usus*.[191] Although it is sometimes thought that Ockham's point that use of fact was no more than the act of using was new, it should be clear by now that this was not the case. Use of fact can mean two different, though related, things: (1) an act of using, such as eating or drinking;[192] or, (2) it can be taken for a licit power of doing (*eliciendi*) such an act.[193] Of the two types of use of fact, the act of using is the more general meaning; this is, Ockham wrote, the only sense John was willing to accept.[194] Scripture usually also means the act of using when it says use (of fact).[195]

Nicholas, according to the *Opus nonaginta dierum*, took use of fact more generally (*magis communiter*) than John, for he used the term in both these

[189] *OND* 64.21–31 (2:571–72).

[190] See, e.g., *OND* 60.101–118 (2:556).

[191] Cf. *Ap.paup.* 11.5 (BOO 8:312a), and *Exiit*, 2:1113. For Bonaventure's influence on this bull, see Maggiani, "De relatione." Elizondo, "Bulla « Exiit »," 82–102, is a more general discussion of the sources of *Exiit*.

[192] At *OND* 33.29–35 (2:510), Ockham claimed that this is probably the original meaning of the term: "'*Simplex usus facti*': Secundum istos illi, quos primo invenerunt uti hoc modo loquendi, acceperunt simplicem usum facti pro actu circa rem exteriorem exercito, qui non requirit in exercente ius aliquod, quo pro tali actu exercendo quis valeat in iudicio litigare; et isto modo actus comedendi est simplex usus facti, quia istum actum potest aliquis exercere, licet nullum ius habeat exercendi eundem actum, quo iure, si impediretur, valeret impedientem in iudicio convenire." Cf. 40.24–61 (2:520), where it is argued that this is the most "proper" meaning of the term.

[193] *OND* 6.181–183 (1:359).

[194] *OND* 2.116–126 (1:301). Admittedly, it is not hard to imagine John having trouble with the concept of a licit power of using as a *meaning* of use.

[195] *OND* 35.47–50 (2:513), mentions two Old Testament passages: Numbers 18:13: "universa frugum initia quas [*OND*: quae] gignit humus et Domino [*OND*: Dominio] deportantur cedent in usus tuos"; and Deuteronomy 24:21: "si vindemiaveris vineam tuam non colliges remanentes racemos sed cedent in usus advenae pupilli ac viduae" Cf. Bonagratia on p. 229, below.

ways, while John did not.[196] Apparently when Clement said that use ought to be common to all in *Dilectissimis*, he was talking about a licit power of using, not the act of using, nor any of the uses of right. Nicholas followed his lead in *Exiit*, though at times he also meant the act of using by use of fact.[197] If one is inclined to like the Michaelist poverty theory, Ockham's reading of *Exiit* is likely to persuade, but it is worth noting that he might be playing a little too loose here. Nicholas does talk about *potestas* in *Exiit*, but on both occasions it is a "libera potestas revocandi" which is said to reside with the donor of alms to the order.[198] The pope, however, also used *usus facti* in a narrower sense. Early on in the *Opus nonaginta dierum*, Ockham suggested that the pope only took use of fact to mean the act of using, never as a licit power.

The adjective "simplex" does not add anything significant to this definition, but including it suggests either (1) that this kind of act does not require some right to be connected or adjoined to it, or (2) that the act is without any right of using. In the first sense, then, a user clearly does have an act of using, though this act does not necessarily require of itself (*de se*) a right of using from the *ius fori*. According to the second way, the phrase simple use of fact simply means that the act of using does not have, de facto, any connected right of using; it is essentially a way of saying "a bare act of using," much like "bare use of right" is called a use of right which is not usufruct.[199] In short, an act of using need not be anything more complicated than an act of using. It may (often) be the case that other relationships (e.g., lordship) obtain, but an act of using does not depend on these other relationships. Or, in the case of (2), the act in question simply does not have an adjoined right of using.

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[196] *OND* 6.260–264 (1:361).

[197] *OND* 6.264–271 (1:361): "quo modo accipit usum beatus Clemens, prout recitatur *Dilectissimis*, cum dicit: *Communis enim usus omnium, quae sunt in hoc mundo, omnibus hominibus esse debuit*, ubi non accipitur usus pro actu utendi nec pro usu, qui est usus iuris nudus, nec pro usufructu, sed accipitur pro licita potestate utendi, et sic accipit usum facti Nicholaus III. Unde simplicem usum facti vocat licitam potestatem utendi, cui non est necessario annexum ius, quo usum valeat in iudicio vendicare; nonnunquam tamen usum facti vocat actum utendi." Cf. 32.304–342 (2:507–08).

[198] *Exiit*, 2:1115–16.

[199] *OND* 71.111–134 (2:596–97). The other Michaelists never quite made this point, but it is an obvious extension of ideas implicit in their texts; see, e.g., *App. mon.*, 839, and *Improbatio* 579 (283). For a discussion of Ockham's understanding of predication, see Freddoso, "Truth Conditions," 8–14.

The point Ockham really wanted to make about simple use of fact is that it is present in every act of using, regardless of context:

> Omnis enim actus exterior utendi re temporali, de quo nunc est sermo, est indifferens ad actum licitum et illicitum: et ita omnis talis est simplex usus facti, hoc est, est usus, qui potest esse sine omni iure, immo potest esse contra ius et illicitus.[200]

The text continues, in fact, to repeat the claim that *simplex* is added in order to make it clear that, in the case of the Franciscans, no right is necessarily connected to their use of fact.[201] Ockham did not specify "positive" right here, but the point is made enough throughout the text that we can be fairly certain this is not a case of confused self-contradiction.[202] Ultimately, Ockham seems to have believed that Nicolas added the term "simple use of fact" to deal with the question of "use of necessary sustenance." This is surely a reasonable, though controversial, concatenation of (1) the claim

[200] *OND* 58.117–120 (2:551): "For every exterior act of using a temporal thing about which there is now discussion is indifferent with respect to a licit and illicit act; and thus every such act is a simple use of fact, that is, is a use which can exist without any right: rather, it can exist against right and be illicit." Cf. 37.128–138 (2:517–18), and 56.59–63 (2:547). It may well be that part of the reason some scholars have been disappointed by Ockham's theory of evangelical poverty has to do with the word "licit." Licit, in this context, merely means "permitted by (some) law." A licit act can be very different from a "good" act, for whether an act should be considered good or bad should, in the first place, be decided with reference to the individual's will; cf. King, "Ockham's Ethical Theory," 229–32. In *Connex.* 2.200–210 (OTh 8:338), e.g., Ockham argued that "aliquis actus est intrinsece bonus moraliter, aliquis intrinsece malus et vitiosus, aliquis neuter sive indifferens. Exemplum primi: *velle* orare propter honorem Dei et quia praeceptum est a Deo secundum rectam rationem etc. Exemplum secundi: *velle* orare propter vanam gloriam et quia contra praeceptum Dei et contra rectam rationem. Exemplum tertii: *velle* simpliciter orare sine aliqua circumstantia dictata a ratione, quia nec propter bonum finem nec propter malum, quia propter nullum finem; et talis actus, sive interior sive exterior, solum dicitur bonus denominatione extrinseca et nullo modo intrinsece, nec vitiosus" (emphasis added). That is, even if, strictly speaking, only acts of the will are "intrinsece laudabilis et vituperabilis" (*Quodl.* 3.14.67–68 [OTh 9:254]), it is possible that an act can be meritorious (or not) through consideration of external circumstances (2.212–229 [OTh 8:338–39]); but note that such acts (virtuous by extrinsic denomination) are in fact morally neutral or indifferent acts, and are virtuous only in so far as they are performed in conformity with necessarily virtuous acts; cf. Wood, *Ockham on the Virtues*, 198. Freppert, *Basis of Morality*, 142, has noted that this is similar to the line taken by Scotus, but Bonaventure made a similar point in his own defence of Franciscan poverty; see *Ap. paup.* 1.7–8 (BOO 8:237b–38a).

[201] *OND* 58.120–129 (2:551).

[202] Cf. *OND* 35.62–65 (2:513), and 56.37–39 (2:547), where Ockham claimed—in an almost identical phrase—that Michael never understood simple use of fact as anything but use (of fact) with no necessarily attached right by which someone could litigate (for the use of the thing) in court.

that the friars only have simple use of fact with (2) the claim that mortal life can do without *proprietas*, *possessio*, *ususfructus*, and *ius utendi*, but no *professio* which excludes the use needed to sustain life (*usus necessariae sustentationis*) can exist in any way.[203]

Use of fact, denoting as it does merely the act of using or the power to perform such an act, can quite easily stand on its own. We have already seen that Ockham believed the narrow sense of use of fact (*sumptus stricte*), the act of using, did not need any basis in law. Thus, one might ask what its connection with lordship is. *Dominium* is founded of course by either divine, natural, or positive law. We have seen how Ockham was more or less uninterested in the first two categories when it came to the institution of *dominium*, for God's lordship falls outside the scope of the poverty controversy, and the common lordship which exists by the law of nature is a special situation, which calls for its own discussion. The real issue, in Ockham's opinion, was that use of fact did not depend on any lordship based in civil law:

> tertium notabile, scilicet, usus facti, sicut actus comedendi et bibendi, potest a dominio in speciali separari. Quartum notabile, quod elicitur ex dictis istius impugnati, est quod dominium, de quo loquitur iste impugnatus in hoc casu, est dominium mundanum et civile, quod est potestas vel habens annexam potestatem libere vendendi, donandi, et sicut sibi placuerit disponendi res, quarum habetur dominium.[204]

This is not to say that use of fact always excludes right and ownership, for many rich people live off only their own goods, merely that the separation is possible, especially through the abdication of all right (such as the Franciscans do).[205]

This brings us to a further significant point in the debate: licit use. Even if use of fact *qua* an act of using can be considered in the abstract, this does not mean the act is really distinct from ethical and legal concerns. That is,

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[203] *OND* 58.29–43 (2:549). Of course, although every use of necessary sustenance is a case of use of fact, this does not mean every use of fact is a case of use of necessary sustenance: 58.112–113 (2:551); the reference is to *Exiit*, 2:1113.

[204] *OND* 4.97–103 (1:331): "the third notable point, namely, that use of fact, such as an act of eating and drinking, can be separated from individual lordship. The forth notable point, which is taken from the words of the attacked, is that the lordship of which the attacked speaks in this case is a worldly and civil lordship, which is a power, or has an annexed power, of freely selling, giving, and of disposing of the things of which one has lordship just as one pleases." Cf. 71.145–202 (2:597–98).

[205] *OND* 58.87–111 (2:550–51). The last sentence of this passage admits that *in una significatione* all simple use of fact does exclude *ius et proprietatem*; presumably, this is because we are talking about simple use of fact *qua* an act of using.

these acts can still be considered licit or illicit, just or unjust, good or bad. A thief, for example, has illicit use of fact when he eats someone else's food; such an act would also be unjust and morally wrong; nor, finally, would he gain legally actionable lordship over the food.[206] For use of fact to be licit, Ockham claimed, only two conditions generally (*communiter*) need to hold: (1) "that the use of fact is not prohibited to the one who wishes to use" ; and (2) "that one has a licence of using from the person who can grant such a licence." In other words, one who is not prohibited from wearing a certain item of clothing only needs permission to wear it from the owner (*dominus*), not some sort of concession of individual or common lordship.[207] A licit power of using is required for use of fact to be licit. But since such a power was granted by God, and cannot be renounced, this is never a hard condition to fulfill.[208]

It is extremely important to note, however, that this "licit" power is not the same as the "natural right of using," despite the claims of others.[209] A licence is always granted by someone, while this most general power was granted by God; the latter is always present, but it can only be used, can only be *licita*, in two basic situations. The first is in a time of extreme need, where *ius naturale* ensures that we can licitly act to preserve our life. This is hardly the situation of day-to-day living, even for a poor Franciscan. This is why a licence is needed: a *licentia utendi*, while it is granted, means that one can use the thing licitly. The power of using in this case is also *licita*.

In some ways, this was a dangerous position to adopt. For example, one problem is that this "licita potestas utendi communissima" sounds like an euphemism for some kind of lordship (for what is such a power but some justified form of control over the object in question?), which would mean a licit act of using is not separable from all lordship. Ockham, however, insisted that there were two reasons why a power to use cannot be simply equated

[206] *OND* 4.178–181 (1:333).

[207] *OND* 4.183–191 (1:333): "Ad hoc quod usus facti alicuius rei sit licitus, duo communiter videntur sufficere. Primum est quod talis usus facti non sit volenti uti inhibitus; secundum est quod habeat licentiam utendi ab illo, qui potest licentiam talem concedere. Sed ista duo possunt haberi absque dominio speciali et communi: sicut aliquis, cui non est inhibitum certam vestem induere, potest habere licentiam induendi talem vestem a domino absque concessione dominii specialis vel communis."

[208] At *OND* 4.192–217 (1:333–34), Ockham explained that humans have a God-given "licita potestas utendi communissima," which can make use of fact licit without lordship (provided the intention to acquire lordship is lacking); this power is irrenounceable.

[209] See above, p. 212, for the natural right of using. Morrall, "Some Notes," 345–47, has made a claim of this sort.

with lordship. In the first case, Ockham argued that although Adam and Eve had been given a power to use nearly all temporal things, this need not be called lordship because they had also been given a non-coercive (*coactive*) power of using angels, which clearly did not involve having some sort of lordship over them. That is, our first parents had merely the power to use certain determinate things.[210] Similarly, not every power of using can be considered (a type of lordship), for animals have a power of eating, but we do not say that they have lordship over what they eat.[211]

A cynic might well wonder at this point whether William saw any connection between an animal's so-called power of eating and humankind's natural power of using, though certainly the response would be on the basis of the fact that in the latter case the action is (usually) informed by reason.[212] But, whatever the precise difference, the fact remains that the early community of believers managed to make do with use without lordship. As we have seen already, Christ was supposed to have avoided lordship and ownership insofar as he was a mortal and wayfaring man. He only had things *quantum ad* use, a licit power of using, a habit (or some kind of stewardship or management) of using.[213]

### 4.5. *Preliminary Conclusions*

As adumbrated by Ockham, *usus* underwent some changes. Even a cursory comparison of the following diagram (Fig. 5.3) with those for Michael (Fig. 5.1) and Francis (Fig. 5.2) show some clear differences. That said, it is important to note that these diagrams can exaggerate the differences between the three Michaelists, and we would do well to remember that Ockham seems to have thought that he was describing a unified picture of the viewpoint of the *impugnatores*, which differed only on trivial particulars. Thus, after summarizing Ockham's general description of *usus*, we should consider in what respect Michael, Francis, and Ockham presented a common front against the pope's account of *usus*.

The diagram shows first of all how Ockham further emphasized how narrow a definition of *usus* was at stake between the Michaelists and the

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[210] See above, p. 164. Ockham's comments on using angels without lordship makes more sense in light of *App. mon.*, 702; see p. 134, above.

[211] *OND* 14.113–126 (2:433).

[212] This distinction will become important later on (p. 251 ff.), where questions of just use are raised. For now, it is important to note only that this distinction is what allows use to differentiate morally good and bad acts from indifferent ones; cf. *OND* 41.65–72 (2:524).

[213] *OND* 94.288–291 (2:713).

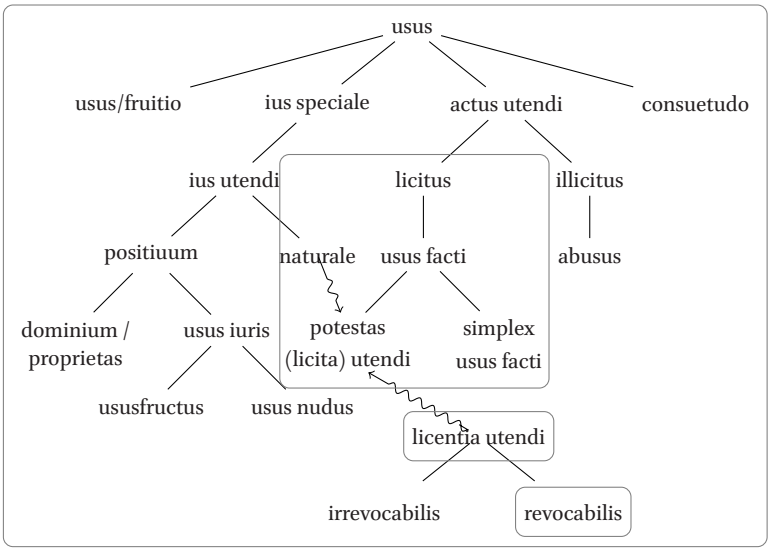


Figure 5.3: William of Ockham on *usus*

papacy. It had nothing to do with *usus* as distinct from *fruitio*, which seems to be more of a philosophical meaning presumably deriving ultimately from Augustine. *Usus* might also be a synonym for *consuetudo* according to an early *capitulum* of the *Decretum*. These are all acceptable meanings of *usus*, just as the term might refer simply to the act of using, which, in fact, is the most common meaning of all.

The heart of the debate centred upon *usus* as the act of using and *usus* as a legal right. In the second sense it was what he called alternately a *ius speciale* or *ius determinatum*, which was merely a *ius utendi*. He was using language reminiscent of Michael's *ius proprium* or *ius personale*, but Ockham reversed the previous relationship of *ius utendi* and *usus iuris* when he explained that every use of right was a right of using but not every right of using was a use of right. The reason for this reversal seems to be twofold. In the first place it makes sense for the crucial distinction between natural and positive rights of using (which roughly correspond to Francis's spiritual and temporal rights of using): a use of right is thus implicitly limited to a positive use of right. Secondly, other property relations, such as *proprietas* and *dominium* also give their holder a right to use, but these rights to use are far different than a more limited use of right, which may be either usufruct or *usus nudus*, that is, the use of things someone else owns.

If one has lordship, ownership, usufruct, or bare use, one's use is licit provided one does not violate the conditions of the lesser rights (such as the obligation to preserve the substance). However, this does not imply that an act of using without a related positive right must be illicit. It can be, as we shall see in the next chapter, but there are also licit acts of using.[214] There are two possible ways this might occur. One might be able to engage, as it were, one's natural right of using. This can only occur, however, when there are no positive law barriers to the use, such as when, say, one comes across some unowned item—perhaps a nice walking stick out in the wilderness—or when one must make use of something in order to stay alive. I am continually reminded of the situation of Jean Valjean in *Les Misérables*, who was compelled to steal a loaf of bread to feed his starving family. Neither the Michaelists nor medieval canonists would deny him this right in principle, though as Brian Tierney noted some time ago, there was very likely a disconnect between the theory of extreme necessity and its actual application.[215]

Of course, a Franciscan did not spend much time in danger of starvation, or in areas where there was a great number of unowned things. Thus, the primary means by which their power to use of things deserves to be called licit is when they are granted, *ex gratia*, a licence of using. A licence allows one to employ their most general, and now licit, power of using without granting them any legal rights to defend their use in court because the granting of the licence of using depends on the potentially fickle whim of the donor. It is therefore to be considered entirely different from a positive right of using, for it is protected by *ius naturale*, not *ius positiuum*.

But if the details of the picture are different for Michael, Francis, and Ockham, the conclusions from each are essentially the same. In the Michaelist world there are five different ways an act of using can be licit: (1) the rare case of dire necessity allows a natural right of using to trump any potentially conflicting property rights; (2) owners may use their goods; (3) owners may give a use of right to another free person; (4) or give a licence of using to another person, including even slaves or members of religious orders (assuming the use of such things are not otherwise forbidden); and, finally, (5) one

[214] In Fig. 5.3 I use *simplex usus facti* to refer to the *nudus actus utendi* as described on p. 218 above.

[215] Tierney, *Medieval Poor Law*, 38–39. As Tierney also noted, however, we should keep in mind the great concern exhibited to the poor by means of personal and institutional alms-giving. The Franciscan order itself witnesses to this, for the friars' commitment to evangelical poverty encouraged many to desire to donate to their cause. It is no small irony that the Franciscans were quite clearly victims of their own success. Wolf, *Poverty of Riches*, read the 'success' of St Francis in this way.

may licitly use an unowned thing. The key to all of this for Ockham is our God-given *communissima licita potestas utendi*, which, he claimed, is always present. This most general power of using is never explicitly identified with our natural right of using, but it is hard to see what difference there can be between the two. Both are always present, but both always yield to existing property rights, except for the natural right in the case of extreme necessity. Since they seem to be the same in application, I am inclined to think they are two sides of the same coin and leave it at that. There are, after all, two other problems which we must still consider: that of consumables and that of the corporate poverty of the Franciscan order.

CHAPTER SIX

# CONSUMABLES

Consumables, or fungibles, pose something of a special challenge in questions of ownership and property rights because of their impermanent nature. One might have no trouble accepting that John could give William a right to use (or maybe merely a licence to use) his favourite *calamus* for a specified amount of time, but have trouble understanding how John could give William a right, or worse a licence, to use a *sextarius* of irreplaceable oriental ink as well. This was as true for John XXII in the fourteenth century as it was for the author of a recent textbook on medieval economic thought. They both reasoned along the same lines. It is because the substance of a consumable, or a *res usu consumptibilis*, is destroyed through use that ownership is inseparable from its use.[1]

At the risk of some tedium, let us review John's position once more. For John there were three related problems. The first was that because use, as he understood it, demanded the preservation of the thing's substance, consumables could not even be used, which was clearly meant to cut short the whole idea that Franciscans (merely) had a use of fact in all things. The second problem was that, even if for the sake of the argument we pretended that the definitional problem of *usus* were a semantic quibble, because all property rights are extinguished with the consumption of the fungible, only the holder of the property rights can licitly consume it. The second problem leads directly to the third: licit use must be, in the final analysis, just use. And just use requires at minimum a right of using for non-consumables, and lordship or ownership in the case of consumables.

## 1. *Bonagratia of Bergamo*

Although Bonagratia's last official entries in the poverty controversy were written before *Quia quorundam* and *Quia vir*, the two most important bulls

[1] Wood, *Medieval Economic Thought*, 226, defined a fungible as "an object that is consumed in use, with the result that its use cannot be separated from its ownership."

for John's take on consumables, he was aware of the objection that use and lordship might be thought to be inseparable in the case of consumables. He argued that the idea was absurd because it would mean that Christ and the apostles would have been individual owners who had individual *dominia*, ownership, and the possession of money, for money, too, is a consumable.[2] Bonagratia was thinking of the *lex* in Dig. 7.5.7, which said that in cases of usufruct for consumables, or things "quae usu continentur," the *proprietas* itself ought to be transferred to the legatee. Thus, Bonagratia noted, this objection seemed to imply that he who renounces the ownership and lordship of consumables seems to renounce use of them as well. Yet instead of explaining why this was not the case, he simply referred to *Exiit* and its account of the five *consideranda* for temporal goods. It was self-evident, he felt, that a slave, *filiusfamilias*, or religious would only have simple use of fact without ever having lordship, ownership, or right.[3] It is likely that Bonagratia simply assumed the absurdity of this position, for, given the way he phrased John's question on evangelical poverty, the question was only one of common proprietary lordship, and this objection led to the conclusion that Christ and the apostles would be individual property-holders, an idea Bonagratia might have felt was so unorthodox as to be beneath consideration.[4] Durand of St-Pourçain's own contribution to the consistory debate shows that this was not so unreasonable an assumption on Bonagratia's part.[5]

The importance of *usus* understandably became much more important in Bonagratia's appeal against *Ad conditorem*. According to Bonagratia, one of three main points to emerge from *Exiit* is that the Friars Minor have only a simple use of fact, separate from all ownership and lordship.[6] This includes consumables, for the lordship and ownership held by the Church remains right up to the point of consumption (*usque ad … consumptionem*).[7]

Bonagratia was something of an optimist: apparently everything the friars used was necessary for the preservation of their life or their ministry. This is

[2] *De paup.*, 507–08. The special problem of money in the John-Michaelists controversy was well treated in Lambertini, "*Usus* and *usura*."

[3] *De paup.*, 501–02. Similarly, neither monks nor religious could have usufruct: *De paup.*, 502–03.

[4] This is surely the implication of his point that things given to the Friars Minor automatically pass into the lordship of the Church; see *App. ACC*, 94.

[5] Durand, *De paup.*, 187, where he agreed that "omnis religiosus abdicat a se proprietatem quorumcumque bonorum temporalium." This is not a full endorsement of Bonagratia's assumption of course, but it is a Dominican's step in that direction.

[6] *App. ACC*, 99.

[7] *App. ACC*, 100.

not the same necessity as extreme necessity, but necessity in the sense that the proper performance of their duties required that they use these things.[8] "Necessities" clearly includes consumables like food and drink, as two *leges* of the *Digest* note.[9]

The way Bonagratia proved *usus* to be separate from lordship and ownership owes everything to his theory of *ius*. We have already seen Bonagratia argue that there were no distinct *dominia* under natural and divine law, and that the *meum–tuum* distinction derived from *ius humanum*.[10] That is, because all things that look to the use (*spectant ad usum*) of humankind are common to everyone "de iure naturali et divino," there is no lordship or ownership (necessarily) adjoined.[11] Bonagratia paired the ubiquitous *Quo elongati* and *Dilectissimis* with a snippet of Ambrose's *De officiis*, which held that nature ensured a common *possessio* of the Earth for all to argue in effect that since there was use of necessities under natural law, which existed at the origin of rational creatures, and thus before the advent of human *dominium*, there must have been a use of things *de iure naturali et divino* without an adjoined "mine" and "yours."[12]

Historically we have also seen cases where the *dominium* resides with God while priests have the use. According to Leviticus 27:30, for example, all tithes are the Lord's; yet Numbers 18:23–24 says of the Levites that they possessed nothing but the tithes which the Lord gave for their use. "In 'usus,'" Bonagratia noted, "non in proprietatem et dominium."[13]

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[8] Cf. the advice of Bonaventure, a strenuous proponent of the need for educated friars, in *Regula novitiorum* 16.3 (BOO 8:490b): "Unde nihil habeas nec per te nec per interpositam personam, et attende semper, ut nihil habeas in cella nisi necessaria, et hoc dico etiam de minimis rebus, ne forte negligendo modica paulatim cadas ad maiora." The growth of the order from *simplices et illitterati* to *doctores clarissimos et peritissimos* is, famously, what made Bonaventure especially love the life of St Francis; see *Epistola de tribus quaestionibus* 13 (BOO 8:336ab). The authenticity of this letter is a matter of debate. Brady, "Writings of Saint Bonaventure," 96, accepted it as genuine, whereas Distelbrink, *Bonaventurae scripta*, 45, remained open to the idea that it was not, even though it is admittedly Bonaventuran in tone and spirit.

[9] *App. ACC*, 100–01, citing Dig. 34.1.6 and 34.1.23.

[10] See above, p. 102.

[11] *App. ACC*, 102: "Ex iure etiam naturali et divino constat in omnibus rebus, sive sint de illis quae non consumuntur usu sive sint de his quae consumuntur usu, usus rerum ipsarum non habet dominium sive proprietatem rerum adnexum sive adnexam, quia de iure naturali et divino omnia quae spectant ad usum hominum sic sunt communia omnibus hominibus, in Inst. 2.1.1." Cf. his *De paup.*, 503.

[12] *App. ACC*, 103, citing D. 5 d.a.c. 1 and D. 35 c. 8; cf. his *De paup.*, 503–04. For Ambrose, see Garnsey, *Thinking about Property*, 125–28.

[13] *App. ACC*, 103: "Praeterea, constat quod dominium et proprietas decimarum et rerum

In the sphere of positive law, *de iure civili et canonico*, Bonagratia could name three situations where lordship and use were separable. Slaves, *filiifamilias*, and monks all use consumable things where they do not have at that point any *dominium*, *proprietas*, or *ius*, only simple use of fact.[14] Starting with the slave, Bonagratia noted that a slave does not have lordship of a *peculium* under Roman law, but that ownership and *possessio* (in its legal sense) resides with the *dominus*.[15] Consumables may be the object of a *peculium*. Thus, even if food is entrusted (*cibaria legantur*) to a slave, the bequest is understood to be the lord's.[16] The same *leges* and outcome more or less apply for a *filiusfamilias*.[17] That monks use things without *dominium* is shown through canon law. According to *Cum monasterium* (X 3.35.6), a decretal the Michaelists all cited and John ignored, monastic rules insist upon an abdication of all ownership in such a way that not even the pope can allow a dispensation.[18] Thus, even a monk's clothing is not considered his own, as one reads in a gloss to *Non dicatis* (C. 12 q. 1 c. 11). Interestingly, this gloss makes its case by reference to the situation of a slave's *peculium*.[19] Another

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Deo et Ecclesiae oblatarum est Dei et corporis eius mystici, scilicet Ecclesiae. Unde per Moysen Dominus ait Levitici 27, 30: *Omnes decimae Domini sunt et illi sanctificantur*; qui per eundem de perfectione levitarum loquens, Numeri 18, 23–24: *Nihil aliud posidebunt, decimarum oblatione contenti, quas in usus eorum et necessaria separavi.* In 'usus,' inquit, non in proprietatem et dominium."

[14] *De paup.*, 502; *App. ACC*, 104, only mentions lordship and ownership. Bertrand de la Tour briefly mentioned these three examples in a similar proof; see Tocco, *La Quistione*, 72–73, and cf. Vital du Four's remarks Christ could having clothing after the fashion of a slave (80).

[15] Discussed above, p. 184.

[16] *App. ACC*, 105: "Ipse enim servus, qui in alterius potestate est, nihil proprium habere potest, in Inst. 3.28.1(!) [see n. 30 in Appendix C]. Unde nec vestimenti sibi a domino suo traditi, nec alterius rei peculiaris habet dominium nec possessionem, Dig. 15.1.25, sed proprietas et possessio semper residet penes dominum, Dig. 41.2.1.5; et Dig. 41.2.24. Et si cibaria servis legentur, procul dubio domini est, non servorum legatum, ut dicitur Dig. 35.1.42, in fine." Cf. his *De paup.*, 502.

[17] *App. ACC*, 105, citing Dig. 41.2.4, 41.2.1.5, 50.17.93, and 35.1.42; cf. *De paup.*, 502.

[18] Hostiensis summarized the point quite simply; *Summa aurea* ad X 3.35 n. 1, Qualiter monachi (1144): "Qualiter monachi uiuere debeant. Continenter et sine proprio, contra quod etiam summus Pontifex dispensare non potest." In the same passage, Hostiensis noted that monks are not even to have *peculium*, unless from a licence of the abbot *ratione administrationis*; he referred back to X 3.35.2, § *Qui vero*.

[19] *Glos. ord.* ad C. 12 q. 1 c. 11, s.v. "possidere": "Sed nunquid uestis est sua quam habet? Vel nunquid dicitur possidere res temporales uel uestem? Non videtur: quia uestis qua semper utitur seruus, de peculio domini est. Dig. 15.1.25. Sed seruus non possidet ea quae sunt in peculio: ut Dig. 41.2.1.24. Item qui ab alio possidetur, ipse nihil possidet: ut Dig. 48.5.22(21)." It is worth noting that this gloss goes on to argue that monks cannot sue or be sued in their own name (except in specific cases).

gloss notes that neither monks nor religious are able to have usufruct, let alone lordship.[20] The conclusion was clear: the lordship of the things a monk or a religious who can have *proprium in communi* always belongs to the monastery or community, while the simple use of fact belongs to the monk or religious. In other words, use is separable from ownership and lordship.[21] In the next chapter we shall see how an order may only have a use of fact while the lordship and ownership resides with someone else.

## 2. *Michael of Cesena*

Unlike Bonagratia, Michael of Cesena had the dubious advantage of reading through other bulls besides *Ad conditorem*, not to mention that he published his first two appeals almost four years after *Quia quorundam*. He had a lot to chew on, and this perhaps accounts for the somewhat disorganized nature of the *Appellatio maior*. However, although some of the problems of consumables were touched upon in *Ad conditorem* already, important refinements and additions were made in both *Quia quorundam* and *Quia vir*. Consequently, whether partial to the Michaelist cause or not, readers will likely find Michael's own position more satisfying than the groundwork laid down by Bonagratia.

### 2.1. (*Ab-*)*Using Consumables*

Michael of Cesena had a venerable tradition to draw on when it came to dealing with the problem of how the use of consumables could be separate from property rights.[22] But John's point that one did not properly 'use' consumbles, only consumed or ab-used them, was in a sense new.

That is, the terminology was new; but the essential problem was an old one, and Michael found fault with the novel terminology.[23] No one denied, of course, that the use of consumables resulted in a thing's consumption. *Abusus* and *abuti*, however, are not good terms to use in this context. It was a point that the Michaelists would repeat again and again. The prefix *ab* did not merely intensify the meaning of *usus* as John had claimed:[24]

[20] See *Glos. ord.* ad C. 19 q. 3 c. 9, s.v. "non extantibus."

[21] *App. ACC*, 105; cf. his *De paup.*, 502–03.

[22] Damiata, *Povertà e potere*, and Mäkinen, *Property Rights*, are comprehensive surveys, but many of the minor texts are found in Tocco, *La Quistione*, 51–173.

[23] *App. maior*, 259.

[24] See above, p. 54.

*usus* and *abusus* were in fact opposites in the same way that the words *habitus* and *privatio* were opposites. This was what Augustine was getting at in his book *De doctrina christiana* when he termed illicit use "abusus vel abusio."[25] Michael drew the expected conclusion: use must therefore be licit use.[26] When making the same point in his earlier appeal, Michael gave the example of someone who uses food "propter Deum"; such a person uses the food in line with the nature of the food as it is set out in 1 Timothy 4:1–3, which explains that God created food, "which should be received by the faithful with thanksgiving" (*cum gratiarum actione*). The point for Michael was that one who uses food in this way "eats with thanksgiving" (*vescitur cum gratiarum actione*): he most certainly does not 'abuse' it.[27] This sort of language may be the proximate source for Ockham's discussion of a licence being a grace, although it is equally clear that Ockham reformulated the language into a more useful format.

*Abusus* could only refer to the mis-use of a thing, to use something against or not in line with (*contra*; *non secundum*) nature. It was merely a *corruptio usus*.[28] Michael was not willing to accept the idea that we can use "ab-use" to mean consumption, mainly because the term simply had too negative a connotation. *Abusus*, after all, "is regularly taken in, or denotes, an evil sense" (*abusus regulariter in malam partem accipitur sive sonat*). It simply would not do to have "ab-use a little wine" in 1 Timothy 5:23, for example, or to say that Christ and the apostles went about "ab-using" consumables in their daily life.[29]

Perhaps the most interesting point of Michael's response for this topic was when he considered what followed from the possibility that there might be two different kinds of ab-use, one where it means illicit use, and a another where it means improper, yet still licit, use (*usus improprius, non tamen illicitus sed licitus*). This second improper but licit use, however, which we sometimes call ab-use, only applies to (*solum attenditur circa*) words and modes of speaking. We may speak improperly, but we are abusing the language. Ab-use *qua* illicit use, however, applies to things. And it is thus the second meaning that must be understood when talking about food and

[25] See above, p. 196.

[26] *App. mon.*, 833: "ergo per oppositum, usus est licitus usus." Cf. *App. minor*, 435.

[27] *App. maior*, 257–58.

[28] And, as such, wherever use could not occur, neither could ab-use: *App. maior*, 259; cf. *App. minor*, 436.

[29] *App. maior*, 258; cf. *App. minor*, 436.

drink and the like.[30] And of course when Clement V said in *Exivi* that the brothers had a moderate use of necessities, and that people necessarily need a simple use of fact, he clearly meant consumables and that the brothers' use of them was licit.[31]

### 2.2. *The Vanishing* Dominium *of Consumables*

Arguing over whether one should use *usus* or *abusus* when talking about consumables may seem like a pedant's pastime, but it was closely connected to a much more serious problem, namely, the problem that through a consumable's (ab-)use the lordship of the consumable is also consumed. To John that seemed incontrovertible proof that any legitimate *usuarius* must have some sort of property right to the consumable. John had argued that licit use of a consumable meant that one had to have a *ius abutendi*, or simply *abusus* in Roman law, which is perhaps best translated as a "right of disposal," or, in Honoré's terminology, a right to the capital.[32] As this was a feature of lordship, the pope's argument concluded that one had to have ownership of a consumable in order to use it. Closely connected to this was the apparent problem that the owner's lordship would seem to be forever severed from the temporal utility that comes from the use of the consumable; that is, consumption of a consumable by the non-owner would seem to violate the Roman law principle that one cannot have a perpetual usufruct.

Although Michael touched on this topic in his earlier writings, because the pope's most detailed argument on this topic only emerged in *Quia quorundam*, the *Appellatio monacensis* contains the most systematic response. Of the seven reasons why John's conclusion and the means by which he got to the conclusion that the use of consumables cannot be separated from lordship and ownership, several bear directly on the problem that the lordship vanishes along with the consumable. The first reason is straightforward. Through "consumptive use," regardless of whether it is just or not, any sort of *dominium iuris* or *ius utendi* to the substance is also consumed. Thus, if a just use of consumables cannot be separated from lordship and ownership *because* both the substance and the property rights are consumed through that use, the argument would seem to lead to the conclusion that an unjust use of consumables could not be separated from lordship and ownership as

[30] *App. maior*, 259–60. Ockham, it may be noted, never bothered with forestalling this objection.

[31] *App. maior*, 260.

[32] See above, pp. 26 and 54.

well. In either case, the lordship and ownership are consumed.[33] In other words, when thieves consume things they have stolen, on John's argument they would become the owners of the stolen goods they consume.

The fourth argument attacks the problem from a consideration of the differences between individual and common ownership. Clearly, both types of lordship are consumed when a consumable is used. Thus if the use is inseparable *because* the lordship is consumed, it would seem that the use of consumables is also inseparable from common lordship. So it would seem that all religious, who vow to live without anything of their own, are actually *proprietarii* and have *dominium proprietatis* both individually and in common, since they "habeant usum talium, et usus talium, secundum utrumque eius medium, sit inseparabilis a quolibet proprietatis dominio, tam proprio quam communi."[34] Naturally, if this were true, it would make a mockery of a religious' vow to live *sine proprio*.

The fifth reason built upon the fourth. If the pope's thesis about the inseparability for consumables of use and lordship were true, then it would seem one had to be granting the lordship with the use. After all, a superior's "power of ordering and disposing" (*potestas ordinandi et dispondendi*) regarding an inferior's use and mode of using can no more be preserved than can the actual lordship. Therefore, we should conclude that the "usus inferiorum in quacumque religione non est separabilis a libera potestate ordinandi et disponendi de usu et modo utendi."[35] This in turn would mean that the infe-

[33] *App. mon.*, 821: "Primo, quoniam constat quod per usum consumptivum iniustum rerum usu consumptibilium ita consumitur quaecumque proprietas et quodcumque dominium iuris ac etiam ius utendi ipsarum sicut per usum iustum et licitum, quia post usum consumptivum iniustum earum non plus remanet proprietas et dominium quodcumque iuris, nec etiam ius utendi ipsarum, quam post usum iustum. Si ergo usus talium rerum non potest a proprietate et dominio separari *eo quod* per actum utendi et cum ipso actu et in ipso actu earum substantia consumitur ac proprietas et dominium, … et per actum utendi ita consumitur quaecumque proprietas et dominium iuris ac etiam ius utendi ipsarum sicut per actum iustum utendi, sequitur necessario, secundum suum medium eroneum, quod usus iniustus talium rerum non possit separari a proprietate et dominio iuris, nec etiam a iure utendi ipsarum, cum quodlibet eorum ita consumatur per usum consumptivum iniustum sicut per usum iustum. Et ita usus iniustus erit necessario iustus, quia usus indivisus et inseparabilis a quolibet dominio et iure utendi, nulla alia circumstantia vitiatus, est usus in se iustus" (emphasis added). The force of the argument clearly depends upon the "eo quod."

[34] *App. mon.*, 823–24: "they have the use of such things, and the use of them, according to both his middle terms, is inseparable from any sort of lordship of ownership, both individually and in common." As this was precisely John's view, there is a good case to be made that arguments of this tenor were meant less to convince John than they were meant to convince the wider world, especially those in religious orders.

[35] *App. mon.*, 824: "use of inferiors in every religion is not separable from a free power of

rior who used the thing would have this free power and would thenceforth not be subject to the decisions and decrees of their superiors—which would destroy all *religio* as far as the chain of obedience is concerned.[36]

The sixth and seven reasons are variations on the same theme, the former about a king's lordship over his subjects' things, while the latter considers the problem with respect to God's lordship. In both cases the lordship is only mediate and only indirectly consumed. Not withstanding the profound difference between human and divine lordship, the point is the same: mediate lordship, regardless of type, is certainly separable if not always actually separate from the consumptive use. Otherwise, in the case of secular lords, the subjects would not have to recognize them as their superiors and lords, but would freely and absolutely hold and possess these consumables, which is, he noted, against every form of political rule (*contra omnem ordinem principatus politici*).[37] In other words, Michael was suggesting—somewhat implausibly—that the pope's arguments led to the untenable idea that the established political order has no stake in the affairs of its citizens. The Minister-General instead saw himself arguing along quite different lines. We might reasonably expect that the emperor, Michael's protector, would be pleased to hear that a *princeps*'s mediate lordship is far from useless. At the very least, the advantage and utility of the subjects redounds to the advantage of their lords.[38]

As for divine lordship, the *dominium Dei actuale* is consumed when a consumable is used much like human lordship—though there remains a virtual and possible lordship of God insofar as he could repair the consumed thing in number. The example cited in this connection was that of sacrifices and oblations. They are consumed through our use, but God has "dominium generale et speciale."[39]

There was also a related problem. According to John, the act of using itself cannot be had. The nature of consumables makes the example even more poignant because it is not clear when the lordship actually ceases to be. John's solution was simple: lordship is consumed through the use, that is to say through the *actus perfectus*;[40] but, for consumables, the lordship itself is transferred along with the use (for non-consumables, at least the right of

ordering and disposing regarding use and the manner of using."

[36] *App. mon.*, 824–25.

[37] *App. mon.*, 825.

[38] *App. mon.*, 825.

[39] *App. mon.*, 825–27.

[40] See above, p. 55.

using is passed). This was a suspicious argument for the Michaelists. They found the pope's idea of a "completed" act too fuzzy, and outright denied that lordship has to transfer with the use.

That simple use could not be "had" was considered John's fourth error in the *Appellatio minor*.[41] The shorter appeal, which was clearly aimed at a larger audience than the more detailed *Appellatio maior*, focused on showing that the pope was in effect arguing that Christ never did things like eat, drink, preach, or wash his disciples' feet. For, according to John's division of an action, this would have to have happened either *ante actum*, *post actum*, or *in ipso actu*. The first alternative fails, Michael argued, because at this point acts of eating, drinking, and the like only exist in potency.[42] After the act also fails, because the act does not do (*exercere*) anything then. And as for during the act, Michael argued that John's subdivision of the present into so small a moment that it can only be intellectually understood, not experienced, is in fact but a summary of a position Aristotle refuted in his *Physics*.[43]

Moreover, it would seem that the pope's argument also proved that use could never be conjoined to lordship for the same reason it could not be separate. After all, if use cannot be had because it does not perceptually exist, it is not clear how it could be joined with something or not.[44] The *Appellatio monacensis* built on this argument in some detail. The basic premise was one Francis also favoured, namely that lordship was lordship regardless of whether it was lordship over a consumable or not:[45]

> Sed natura rerum usu consumptibilium est eadem genere et specie in speciali et in communi, quia differentia subiectorum utentium non variat genere nec specie naturam rerum utibilium, et per usum rerum usu consumptibilium ita consumitur dominium commune sicut consumitur dominium proprium, quia post usum earum non plus remanet dominium commune quam dominium proprium et e converso.[46]

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[41] Michael quoted from *ACC*[2] 168–187 (243–45).

[42] *App. maior*, 267, adduces proof from X 3.48.5(!), and 4.2.13.

[43] *App. minor*, 439. The similarities between John's opinion and the one Aristotle refutes are indeed striking; see Aristotle, *Physics* 4.10 217b30–218a9, in Bossier and Brams, *Physica* (*vetus*) 2:170.

[44] *App. minor*, 439–40; *App. maior*, 268.

[45] *App. mon.*, 829.

[46] *App. mon.*, 833–34: "But the nature of things consumable by use is the same in genus and species, individually and in common, for the difference of using subjects does not change the nature of usable things in genus or species; and through a use of things consumable by use a common lordship is consumed in the same way as an exclusive lordship is consumed, for after a use of these things a common lordship remains no more than an exclusive one, and vice versa."

If someone can use something separate from individual lordship, which is the situation of most religious, there is no reason why that person could not use something separate from common lordship. That is, because use was separable from common lordship, it was unqualifiedly and absolutely separable *de se et de natura sua*.[47]

Although Michael never subjected the pope's argument to an investigation of the semantics of *perfectus* to the same degree that Ockham would, it is clear that he thought the pope's concern about the problem of locating an act of using in time to be a little absurd. As for figuring out at what point a lord ceases to have lordship of a consumable good, Michael put it this way: not all so-called consumables deteriorate immediately at the first instance of being used; this is even true to some extent for a crust of bread. Therefore, "sicut non est inconveniens quod dominus habeat dominium servi comedentis, ita non est inconveniens quod habeat dominium cibi vel panis exsistentis in ore servi."[48] In the longer appeal he added that this was because the slave was actually unable to obtain ownership, lordship, or (legal) *possessio* insofar as he was under the authority (*potestas*) of another.[49]

### 2.3. *Must Licit Use Be Just?*

In the last chapter we saw that the Michaelists thought a licence of using was enough to ensure that any subsequent use would be licit so long as the licence was still in force. The pope, on the other hand, argued that this licence had to be a sort of *ius* because otherwise that use would not be just, and *ipso facto* illicit. No Franciscan doubted that a friar's use was to be licit and just, of course, but the Michaelists were convinced that John simply had a wrong-headed conception of what the prerequisites were.

Surprisingly, Michael seems to have been unable to come up with a worthwhile solution to this problem. Before the pope had formulated the strong version of his position in *Quia quorundam*, Michael had only to deal with the case of *Ad conditorem*, which had simply argued that just use needed at least a right of using. Michael saw three problems with this simplified position. At their root, they all conflicted with some aspect of what Nicholas had intended in *Exiit*. He first quoted from where Nicholas had said that, of the

[47] *App. mon.*, 834.

[48] *App. minor*, 440: "just as it is not unfitting that a lord has lordship of his eating servant, so it is not unfitting that he has lordship of the food or bread existing in the servant's mouth."

[49] *App. maior*, 269.

five *consideranda* for temporal things, simple use of fact was necessary and no religious profession could exclude from itself "usum necessariae sustentationis."[50] Nicholas thus clearly thought simple use of fact could be licitly had without property rights, for one cannot licitly lack things like *proprietas*, *possessio*, *ususfructus*, or *ius utendi*, and be content with only simple use of fact if the simple use of fact were an unjust act.[51] On a related point, Michael argued that since *Exiit* sanctioned the Franciscan poverty theory, and since this theory vowed to follow Christ in this type of poverty, it must be licit and just to have simple use of fact without any right of using—provided one has at least a licence to use:

> quia aliud est habere ius utendi et aliud est habere licentiam utendi, et ideo quamvis usus absque omni iure et licentia esset illicitus, usus tamen absque iure utendi, cum licentia tamen utendi, non est illicitus.[52]

This last was clearly an argument that would only convince one who needed no convincing.

For the third point, he quoted again the decretal. *Exiit* explicitly spoke of a "usus non iuris sed facti tantummodo nomen habens; quod facti est tantum, in utendo praebet utentibus nihil iuris."[53] From there, Michael pointed out that the Church cannot err, and went on to examine more closely the nature of *ius utendi*, the types of *ius*, and the nature of *licentiae*, all in a bid to maintain that simple use of fact without a right of using is not to be thought of as (necessarily) unjust.[54] But as these are all topics we have already investigated, there is no need to retrace our steps now.

### 3. *Francis of Marchia*

Francis located a lot of his argumentation against the pope in his various discussions about consumables, for he thought it was clear that any argu-

[50] *Exiit*, 2:1113.

[51] *App. maior*, 261: "Non autem posset licite carere praedictis et contenta esse simplici usu facti si simplex usus facti non posset licite haberi ab aliquo absque iure utendi et si simplex usus facti absque iure utendi esset iniustus actus, cum nulla prorsus possit esse professio licita quae iniustum actum in utendo temporalibus rebus admittat, quia si usum illicitum sive iniustum admitteret, talis professio foret illicita et criminosa et professioni christianae contraria." Cf. *App. minor*, 437.

[52] *App. minor*, 438: "for it is one thing to have a right of using, and another to have a licence of using; and therefore, although use without any right or licence would be illicit, a use without a right of using, but with a licence of using, is not illicit." Cf. *App. maior*, 261–62.

[53] *Exiit*, 2:1113: "use not of right, but only having the name 'of fact'; that which is only of fact offers nothing of right to the user during the use."

[54] *App. maior*, 262–65; cf. *App. minor*, 438.

ment that could prove the separability of use and lordship or rights of use in connection with consumables would also, a fortiori, be valid for non-consumables.

### 3.1. (*Ab-*)*Using Consumables*

Francis, like the other Michaelists, was not at all convinced of the need for or accuracy of this new terminology of *abusus*. John, we know, had argued that of the five *consideranda* Nicholas described in *Exiit*, the only one that applied to consumables was ownership. Francis's main problem with the pope's position was again its implicit assumption that legal definitions suffice for a general understanding of the question, which also explained why the pope had the strange idea that use of fact could not be "had."

Let us start with the terminology. Francis began by pointing out that the use John claimed to have been discussing was one "divided against" the other four *consideranda* of *Exiit*,[55] but the pope's civil law definition of use as a right of using with the substance preserved precluded this possibility.[56] John was thinking in terms of civil law and Nicholas was not, Francis claimed, for while Nicholas divided simple use of fact against ownership, possession (which Francis consistently omitted in his discussion), usufruct, and right of using, the laws do not take *usus* and *uti* as divided against usufruct and a right of using, for they fall under the very definition of use.[57]

The pope's claim that use and using are an imprecise way of speaking about comsumption and consuming is equally confused. If, as John claimed, Scripture always meant consumption and consuming when it said use and using, then the two are synonymous, and if the one is found in consumables, the other must be as well.[58] In fact, the connection between either of these sets of terms to ab-use and ab-using is far more tenuous. Francis was adamant that sacred Scripture never took use or consumption for ab-use.[59] The pope's terminology was, in short, profane and unsuitable, neither in concordance with sacred Scripture nor with the fathers when they spoke

[55] *Improbatio* 567 (277).

[56] *Improbatio* 568–572 (277–78), 578 (282).

[57] *Improbatio* 602 (290); cf. 629–630 (299–300).

[58] *Improbatio* 605 (291): "quia si consumptio est usus et consumi uti, et in talibus proprie reperitur consumptio et consumi, ergo in eis proprie reperitur usus et uti."

[59] *Improbatio* 606 (291). Elsewhere he would claim that the terms are opposites: 615 (294–95).

about consumables, nor even with common usage, which both Aristotle and Augustine endorse as commonsense.[60]

More to the point, civil law opposes *abusus* to a use of right insofar as the latter requires the preservation of the substance, but it does not universally oppose *abusus* to *usus*, particularly not to "usui actuali facti," for the laws do not deny this use for consumables.[61] Human laws do not deny consumables a use of fact composed of both the act of using and a natural right of using; however, since John's use of right demands the preservation of the substance, it clearly cannot apply to consumables.[62] Passages in the *Institutes* in fact suppose an act of using and an actual use of fact.[63]

In a much longer-winded fashion, Francis argued that John's reasons for championing ab-use as the proper term for consumables fell flat, but we should notice some of the friar's disingenuousness here. Even if we accept that a legal definition of use—whether it can pertain to consumables or not—is too narrow for a generic definition, it does not follow that *abusus* is not a more accurate term for the use of consumables. John was in fact being entirely consistent when he argued that use could not apply to *res usu consumptibiles* (since it demanded that the item not be consumed or used up), nor that use was a good way of describing what one did with consumables. The real point, and this was not lost on Francis, was that because a consumable was consumed through (ab-)use, a right of using was not enough to ensure just or licit use of a thing; because the *dominium* of a thing vanished along with the thing, one had to have a right to consume the lordship as well.

### 3.2. *The Vanishing* Dominium *of Consumables*

Francis's solution to the problem of the vanishing *dominium* was to examine the nature of lordship as a consumable is (being) consumed. John had argued that the lordship of a consumable was consumed along with the thing. Francis agreed to this, of course, but used this point to demonstrate the separability of use and lordship. Francis made his point in a number of ways.

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[60] *Improbatio* 608–612 (292–93), and 617–626 (295–99); cf. 664–666 (310–11).

[61] *Improbatio* 632 (300–01); Francis cited Inst. 2.5.5 as evidence.

[62] *Improbatio* 653 (306).

[63] *Improbatio* 655–656 (307), citing Inst. 2.5 pr.–1, 2.5.4. See p. 347 n. 25, below for a discussion of Francis's confused reference. We should also note that Francis did not mention Azo in this connection, unlike Michael and William.

One approach was to attack the pope's position from a logical perspective. Beginning with the axiom that a universal conclusion does not follow from a particular middle term (*ex medio particulari*) in any science except accidentally, he noted next (as we have already seen) that John's definition of use, which required the substance to be preserved, was not a universal definition. At best the pope's argument can only conclude that that use, under this specific definition, cannot be found in consumables.[64]

Francis also gave a number of examples that he believed clearly proved the separability of use and lordship. The first example Francis adduced was what happened to God's lordship when a thing is consumed (which was, admittedly, not a question that John felt was relevant to the question at hand). When a thing is consumed, Francis explained, both human lordship and, indirectly, God's actual divine lordship is consumed. As it is clear that our use is separate from divine lordship, it follows that use is separable from lordship in this case at least.[65]

The other two examples were more mundane. He explained first that John's own position, incoherent as it was, conceded the very conclusion that he was arguing against. One example was that of an individual using something that was communally owned. With respect to the consumption of a thing, it does not matter whether the thing is individual (*proprium*) or common, for individual substances do not remain any more than do common ones after use. If John were right then, it would follow that use would be inseparable from both individual and communal ownership and lordship, for neither would be preserved after a consumable had been used.[66] Thus, among the first multitude of believers, everyone would have had individual and communal ownership and lordship of the things they used, contrary to what we read in Acts 4:32.[67] Francis employed his *de possibili* argument here as well. If, he wrote, the members of the early Christian community each had personal use for some time separate from individual ownership and lordship—as the passage in Acts suggests—then the same is potentially true (*de possibili*) of common ownership and lordship by the same reason. After all, the ownership is consumed through use regardless of whether it is

[64] *Improbatio* 26 (60).

[65] *Improbatio* 10–11 (50–51).

[66] *Improbatio* 23 (57).

[67] *Improbatio* 24 (58); cf. 102–103 (92). As he noted, this was not a conclusion that John had explicitly defended.

individual or communal.[68] The similarity to Michael's argument needs no elaboration.

The other example Francis offered was that of unjust use. We shall come to his arguments on this topic in a moment, but for now the point was simply that if unjust use entailed use without ownership or rights of use, this alone would be enough to demonstrate their inherent separability: through unjust use all ownership and lordship is consumed, whether of right or of fact. Otherwise, he explained, all things would, *de iure*, belong to the thieves and bandits.[69]

Clearly, neither side would defend a claim of this sort. But the problem remains as to how one can consume things that are not his own, as does the uncertainty of how and how long the owner maintains lordship over an item that someone else is consuming.

John, we know, believed that consumables are consumed "per usum utendi perfectum," which is why they are so called.[70] It was for this reason that John denied that use of fact could be 'had.' It too, like *dominium*, suffered from a tendency to vanish under scrutiny. Francis did not take kindly to the pope's attempt to becloud (*obnubilare*) the eyes of men.[71] As usual, John's arguments ran the risk of overturning the truth of Scripture. The very key to his argument, that "esse rem perfectam significat,"[72] only proved—were it true—that one cannot give or concede use to anyone else,[73] and that no one could ever come to do anything corporally.[74]

These conclusions derived from two related considerations: first, the nature of non-permanent, successive things; and, second, the basic relationship between *esse* and *fieri*. Consumables naturally do not belong in the

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[68] *Improbatio* 137 (105); cf. 65 (77); and 338 (185).

[69] *Improbatio* 25 (59). To drive home the foolishness of John's position, he added: "Ynmo ex hoc sequitur quod usus iniustus sit inseparabilis a iure utendi quocunque ipsarum, quia per usum iniustum ipsarum consumitur quodcunque ius utendi earum sicut per usum iustum, cum post usum iniustum non remaneat aliquod ius utendi earum. Et ita usus iniustus erit usus iustus, cum usus a iure utendi indiuisus sit usus iustus: quod est erroneum et insanum." In passing, we might wonder what Francis meant by a *proprietas* or *dominium facti*, since he clearly thought all legitimate lordship was a legal title to a thing; but it is a small slip, I think, and not one we should be overly concerned with: after all, no matter what it is, it is indisputable that it would be consumed by a consumptive act.

[70] *Improbatio* 791 (352); see above, p. 55.

[71] *Improbatio* 787 (350).

[72] *Improbatio* 771 (345), part of a (highly inaccurate) quotation from *ACC*[2] 168–185 (243–45).

[73] *Improbatio* 783 (349).

[74] *Improbatio* 781 (348). A similar argument was made in the *App. minor*, 439.

category of permanent things, but that does not preclude them from being had successively in the way time is had.[75] The concrete examples Francis offered were taken from Scripture. The existence (*esse*) of a thing, John suggested, indicated the completed act.[76] A claim of this sort would make a mockery of the two men's response to Jesus that today is the third day (Lc. 24:21), or that it was the winter at the time of the Feast of the Dedication (Io. 10:22), or that it was night when Judas left after Jesus predicted his betrayal (Io. 13:30).[77] In all these cases, the existence of those temporal moments did not depend on their being *perfecta*. The same, Francis felt, could thus be true about moments relating to use of fact.

One might object that the way we might have an apple while we consume it does not, after all, seem similar to the way we experience—'have'—time. The analogy with time was not Francis's fault, however: John had raised the issue first.[78] The pope had argued that use of fact did not ever exist in reality (*in rerum natura*), not before, during, or after the act. This implied, Francis noted, that there would never be, *formaliter*, a user. The analogy this time is to a quality: just as a white thing is not formally white except by whiteness, so a user is not formally a user except by use. Thus, Francis claimed, what John was in fact arguing was that no one ever uses anything in reality.[79]

The other consideration the pope's claim about *esse* brings out is the relationship between *esse* and *fieri*, for just as the *esse* of a permanent thing consists in permanent being, so the *esse rei successiue* consists in successive becoming (*in fieri successiuo*). In other words, John was wrong: "ergo esse rei successiue significat ipsam in fieri successiuo sicut habet esse in fieri successiuo et non in esse perfecto."[80]

The fact that the existence of a successive thing exists in successive becoming means that the pope's position would, were it true, lead to all kinds of preposterous problems. For example, since a successive thing exists through becoming, if it is impossible for the successive to exist in reality, then it is impossible that it could come about. (Francis suggested John's "quod impos-

[75] *Improbatio* 173 (118): "non est de genere permanencium."

[76] Above, p. 55. Note, however, that John never used the exact phrase "esse rem perfectam significat" that Francis ascribed to him.

[77] *Improbatio* 778 (247).

[78] Above, p. 55.

[79] *Improbatio* 775–776 (346): "nullus unquam utatur actu aliqua re quacunque in rerum natura."

[80] *Improbatio* 779 (347–48): "the being of a successive thing signifies, therefore, the thing itself in the successive becoming, just as it has its being in the successive becoming and not in the completed being."

sible est esse, impossibile est haberi" is the equivalent of "quod impossibile est esse, impossibile est fieri.") But this would mean that Christ, the apostles, and other faithful Catholics never did anything that Scripture says they did—for what was impossible to do was never done.[81]

The conclusion we are left with is that a successive thing, like use of fact, can be held successively. And if it can be held successively, then surely the use of consumables is separable from lordship as long as the thing remains unconsumed.[82] Put another way, John's claim fell apart no matter how one looked at it. There were two ways of thinking about what happened when consumables were used: either ownership and lordship remained continuously while a consumable was being used or not. If not, and lordship ceased before the use ends, and (as John had said) the right of using was not separate from ownership and lordship, then the right of using does not remain continuously under use, but ceases before the end of use. Consequently, it follows that use is separate from ownership and a right of using for the time at which neither the ownership nor the right of using remains. And thus the Michaelist position is proved: there can be just use without ownership and without a right of using.[83]

The other alternative is no better. The pope would have to face two problems if ownership endured until the end of the act of use. The first problem was that this position amounted to admitting that use, properly so-called, is found in consumables. For the reason it was denied was that use does not presuppose the saving of the substance any more than ownership and lordship: use was only denied of such things because the lordship and ownership were consumed through 'use.' A thing is properly someone's with respect to lordship as long as the ownership and lordship are preserved under use; therefore, use is properly found in a thing as long as someone has lordship of it.[84] Moreover, if ownership endured as long as the act of using did, use must be separate from ownership and lordship insofar as a use under which ownership and lordship is continuously preserved is continuously separable from ownership and lordship. Therefore, if ownership and lordship endures as long as use does, but no longer, it follows that use is separable while it endures—though ownership is not separable after "usus perfectus."[85]

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[81] *Improbatio* 781 (348).

[82] *Improbatio* 792 (352). Francis's conclusion was that John contradicted himself by holding (a form of) both versions: *Improbatio* 798 (354).

[83] *Improbatio* 793 (352–53).

[84] *Improbatio* 795 (353).

[85] *Improbatio* 796 (353).

### 3.3. *Must Licit Use Be Just?*

In many ways, the crux of John's case against the Michaelist position lay in his argument about the prerequisites for licit and just use. For use to be licit, as we have seen, it must be just; and just use entailed at least a right of using, or, in the case of consumables, at least a claim of ownership. This meant, of course, that any so-called *licentia utendi*, if it meant anything, meant no less than a right of using.

Francis's twofold *licentia* and their relationship to *ius* allowed Francis to agree that licit use must be just without equating the licence and the right. As he explained, any use which takes place without either a temporal or spiritual right of using cannot be just; but a spiritual right of using can well suffice for an act to be just.[86] Thus, on Francis's reading of X 5.40.12, when Isidore wrote that "what is justly done is done with right" (*quod iuste fit, iure fit*), we should understand "by a spiritual right, not by a temporal right," the latter being the one Michael denied and John affirmed in their exchanges with one another.

As for the pope's other point on this issue, that there are no indifferent acts insofar as they are always just or unjust, Francis had little to say:

> Quod uero dicit [John], quod "inter iustum et iniustum non [Michael] est dare actum humanum indifferentem," est falsum de actu humano iusto ex iure utendi temporali, et iniusto ex opposito iuris utendi temporalis, quia [Michael] est dare actum humanum denudatum omni iure utendi temporali et contrario sibi opposito.[87]

This was no more than a simple denial of the pope's position based on his earlier distinction regarding the twofold nature of *ius utendi*. As we shall see, Ockham had a much more cogent response on this point.

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[86] *Improbatio* 746 (336); at 745 (336), Francis made a case based on the situation of a monk using a thing for which he has no personal right to use: "si religiosus quicunque potest habere usum iustum ex iure utendi sue communitatis absque omni iure utendi proprio, multo magis perfectus seruus Dei potest habere usum iustum ex iure extrinseco et separato Dei, absque omni iure intrinseco et coniuncto proprio sui, quia perfectus seruus Dei magis est in uoluntate Dei quam sit religiosus in manu sue religionis et Deus etiam assistit presencior suo seruo quam religio suo subdito. Si ergo religiosus potest uti rebus sue religionis iure religionis et non suo, eadem ratione uerus seruus Dei poterit uti rebus Dei iure Dei et non suo."

[87] *Improbatio* 766 (343): "But what he says—that 'Michael is not to give an indifferent human act between just and not-just'—is false regarding a human act [that is] just because of a temporal right of using and unjust because of the opposite of a temporal right of using, because Michael is giving a human act denuded of every temporal right of using *and* the contrary one opposed to it" (emphasis added). For John's argument, see p. 59, above.

## 4. *William of Ockham*

Ockham answered the pope's challenge about the relationship of just use and consumables in a wholly novel way. Although there are in general many similarities between the Michaelist texts, Ockham's account of the nature of justice and the just went beyond the earlier texts. It is certainly the fullest solution to the problem, even if it is not one that all modern commentators have appreciated.[88]

### 4.1. (*Ab*)*Using Consumables*

In his systematic way, Ockham described the Michaelist understanding of *res usu consumptibiles* near the beginning of the *Opus nonaginta dierum*. Consumables, he wrote,

> sunt illae, quae ipso usu, id est actu utendi, vel penitus consumuntur quantum ad utentem vel ut communiter deteriorantur et tandem consumuntur; huiusmodi sunt cibus et potus, medicinae, unguenta, pecuniae, vestimenta et similia.[89]

Because John had argued that, strictly speaking, consumables cannot be used (*uti*), but only 'used up' or ab-used (*abuti*),[90] Ockham first had to show that it makes sense to talk about using consumables. Ockham recognized two types of consumption: "uno modo pro consumpto esse; alio modo pro motu seu alteratione praecedente consumptum esse."[91] The first type is thus nothing more than the usual meaning of consumption; the second type, Kilcullen and Scott aptly described as "consumption in progress."[92]

The other issue that Ockham had to answer was John's claim that, *secundum leges*, use cannot be 'had' in consumables because one cannot enjoy the fruits of a consumable without also destroying the substance of the thing. One of the reasons for Ockham's careful distinction between the various

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[88] E.g., Brett, *Liberty, Right and Nature*, 50–68.

[89] *OND* 2.236–241 (1:304): "Consumables are either what are completely consumed with respect to the user, or are what generally deteriorate and are finally consumed through the use, that is, by the act of using. Food, drink, medicines, oils, money, clothing, and similar things are this sort of thing." Note that Ockham begins by noting that consumables are not always immediately consumed, which allows him to set-up the standard Michaelist position on consumables a little more easily.

[90] For John's view of consumables, see above, p. 54.

[91] *OND* 43.78–80 (2:530): "in one way, for having-been-consumed; in another way, for the motion or alteration preceding having-been-consumed."

[92] Kilcullen and Scott, *Ockham's* Work of Ninety Days, 374.

types of law now becomes clear: use of fact, as only the act of using, does not pertain to civil law. In fact, the legal meaning of use is but one of several meanings. According to other senses of the word, it is perfectly normal to say that someone uses consumables. Therefore, just because it may be inappropriate to say "I used an apple" instead of "I consumed an apple" in legalese, it does not mean Scripture speaks incorrectly when it says "vino modico utere" (1 Tim. 5:23). Thus, in a non-legal sense consumables are used; and in fact there are three ways "aliquid consumi per aliquem actum" may be understood.[93] In the first way, a *res absoluta* ceases to be through some act, such as food and drink being digested. Like so-called absolute things, which are either substances or qualities according to Ockham, relations might also be consumed in the sense of cease to be.[94]

Thus, the second way something is consumed is when an absolute thing ceases to have a relation (*respectum vel appellationem aliquam respectivam*). The example Ockham gave was that of spending money. Money is "consumed" when it is spent, but the coins themselves do not cease to be, only the relation the spender had with the money. The third way does not exist separately from the first and second ways, but something may also be consumed through an act in the sense that "aliquis respectus vel appellatio respectiva" ceases to inhere in someone or be verified of something. Thus, say, God's lordship of something can be said to be consumed because he ceases to be the lord of that thing upon its consumption; but, naturally, we do not say that God ceases to exist through that act.

With this distinction in hand, Ockham then turned to the pope's *ultima evasio*, namely that the act of consuming is not and cannot exist in reality (*in rerum natura*). This claim ultimately rests upon a contradiction in John's argument. The pope maintained that *usus* and *uti* cannot properly claim a place in consumables, but *consumptio* and the *actus consumendi* does have a place. According to Ockham, however, consumption and the act of consumption are merely types of use or using;[95] therefore, since consumption certainly does exist in consumables (on John's terms), use must as well.

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[93] The following discussion is based on *OND* 41.77–90 (2:524).

[94] *SL* 1.49.23–24 (OPh 1:154): "Est autem ista opinio quod praeter res absolutas, scilicet substantias et qualitates nulla res est imaginabilis, nec in actu nec in potentia." Ockham argues against quantity being a *res absoluta* in *SL* 1.48 (OPh 1:152–53). On absolute and relative substances, see briefly Adams, *William Ockham* 145–46; the topic is discussed *passim* in Spade, "Ockham's Nominalist Metaphysics," and relations are discussed in Maurer, *Philosophy of Ockham*, 47–51.

[95] Cf. *QVR* 43.3–6 (2:528).

### 4.2. *The Vanishing* Dominium *of Consumables*

As we have seen, Ockham believed that one had to meet at least two basic conditions for use to be just: that the use in question is not prohibited to the would-be user (e.g., no vow prohibiting the use), and that he or she has been granted a licence of using from a legitimate authority (e.g., the owner). Anything in excess of these two criteria, such as possessing legitimate rights to the use, or lordship, naturally ensures the justness of the use—provided, of course, that the use is not directed to an unjust end. In the case of consumables, however, one significant problem seemed to be that because the thing is eventually consumed, the granter of the licence had to lose his lordship at some point, which would mean he would eventually also lose his ability to grant such a licence. The pope was not convinced, for instance, that the use of a consumable could ever remain in the power of (*penes*) of one person while the lordship remains in the power of another.[96] Ockham responded to this with a list of examples where this is not true: a servant may use his lord's money or wear clothes which belong to his lord, or one might choose to employ (*conducens*) his money for display (*ad pompam*).[97]

To the pope's argument that things are consumed by the completed act,[98] Ockham responded that there are three ways of understanding *perfectus*. According to the first sense, an act is *perfectus* because "nichil deficit actui, quod requiritur ad esse vel bene esse actus, sicut homo dicitur perfectus, quando nichil deficit homini, quod requiritur ad esse vel bene esse hominis."[99] The second and third ways have quite a different sense. An act is *perfectus* either because it is finished or completed; or, an act is called *perfectus* when the goal of the act has been attained, much like the building of a house is called *perfecta* when the house is finished (*facta*).[100] The second and third way, then, do not allow us to speak about the separability lordship or ownership in any meaningful way, for the act is over and questions of lordship are moot because the item in question has been consumed. Besides, since the act is over at this point, it cannot be either separate from or

[96] Earlier Ockham only tried to show (*contra* John) that lordship and use is separable in some cases; now he is arguing for a more specific, and stronger, claim; cf. *OND* 73.77–82 (2:601).

[97] *OND* 32.196–202 (2:504).

[98] See above, p. 55.

[99] *OND* 73.24–26 (2:600): "the act lacks nothing that is required for the being or well-being of the act, just as man is called *perfectus*, when he lacks nothing that is required for a man's being or well-being."

[100] *OND* 73.27–31 (2:600).

joined to lordship.[101] Instead, Ockham claimed, Michael had only intended to claim that the act of using, *while it lasts*, can be separated from ownership and lordship.[102] In other words, Ockham believed that the act of consuming, when considering claims of (non-)lordship, could only ever be *perfectus* in the first sense.

The pope's related claim, that the act does not exist in reality while it is being done, led Ockham to explain the *impugnatores*' position on *successiua*. As Ockham understood the pope, his claim amounted to the notion that successives cannot exist in reality. For his rebuttal, Ockham expanded greatly on the scriptural passages cited by Francis.[103] The tenor of these passages is that successive phenomena such as night, winter, time, movement, voices, words, sounds and so forth do exist.[104] Furthermore, anything that can be given also clearly exists in reality. As the pope admitted that an act of using can be given,[105] it follows that such acts can and do exist. Like his confreres, Ockham took the pope's conclusion that an act of using does not really exist and argued backwards from it to a *reductio ad absurdum*.[106] The idea is simple. Ockham suggests these three propositions are equivalent: (1) "Utens est in rerum natura"; (2) "Album est in rerum natura"; and (3) "Musicum est in rerum natura." Each statement makes the claim that the subject of the sentence 'really exists.' The third proposition can only be true if both music—the form denoted as belonging to the subject—and its subject really exist. The same, then, is true for the first. There must be both an individual and an act of using. Thus, if, as John claimed, there is no such thing as an act of using, then there cannot be a user.[107] The solution is to admit that

[101] *OND* 73.46–51 (2:600).

[102] *OND* 73.35–37 (2:600).

[103] See above p. 243.

[104] *OND* 67.47–93 (2:583–84).

[105] See above, p. 48; cf. *QVR* 30.1–12 (2:495).

[106] We should note that Ockham passed up a clear opportunity to relate the *OND* to his philosophical writings. This is indeed a great opportunity to connect this problem to, e.g., his commentaries on Aristotle's *Physics*, yet in the one paragraph where Offler identified similarities to his academic views (67.184–199 [2:587]), Ockham wrote that the *impugnatores* "nolunt multum insistere." See Goddu, "Ockham's Philosophy of Nature," 162–64, for his academic views.

[107] *OND* 67.117–129 (2:585). The terms *utens*, *album*, and *musicum* are, according to *SL* 1.10 (OPh 1:35–38), *nomina connotatiua*, that is, words which signify one thing primarily and another secondarily (e.g., aliquid informatum albedine). The point of the *OND* passage is that connotative terms imply and require two different things, a substance and the appropriate accidental quality. Cf. *Improbatio* 775–778 (346–47), discussed on p. 243, above. Ockham seems to have developed Francis's arguments, but see also *SL* 1.57.9–78 (OPh 1:183–86) regard-

acts of using do exist. The pope unwillingly admitted this anyway when he said that acts of using exist *in potentia* before they are enacted. According to Ockham, anything which exists in potency can, at some point, exist *in actu* even though it does not so exist while in potency.[108]

Ockham also noted the absurdities which followed upon John's claim that use, as an *actus utendi perfectus*, cannot be separated from lordship or ownership:

> Item, contra praedicta [the *impugnatores*] arguunt sic: Aut, [1] per actum utendi non perfectum[109] vel principium actus (per quem vel per quod nequaquam res consumitur) necessario acquiritur dominium rei seu proprietas, si antea minime habebatur; aut [2] non necessario acquiritur, etiam licet prius habitum non fuisset. Si detur primum, ergo, sicut actus perfectus non potest esse a dominio separatus in re usu consumptibili, ita etiam actus alius, qui non est perfectus (secundum istum [John XXII]) non potest in re usu consumptibili a proprietate seu dominio separari; et per consequens absque rei consumptione non potest in rebus usu consumptibilibus actus utendi a proprietate seu dominio separari. Si detur secundum, habetur propositum appellantis, quod scilicet aliquis potest uti re usu consumptibili absque dominio seu proprietate.[110]

According to Ockham, either lordship or ownership of a (consumable) thing is necessarily acquired through an incomplete act of using or through the beginning of such an act, or it is not. In the case of the former, and on John's terms, the act of using cannot be separate from lordship whether complete or not—which cannot be true since usufruct is an example of use without lordship. The Michaelists, of course, maintained the much more reasonable position that lordship is not *necessarily* acquired through such imperfect acts of using.

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ing statement (1).

[108] *OND* 67.130–140 (2:585–86).

[109] That is, *perfectus* in the second or third senses.

[110] *OND* 73.83–94 (2:601): "Likewise, they argue in this way against the aforesaid: Either (1) lordship or ownership is necessarily acquired through a non-finished act of using, or the beginning of the act (through which act or beginning the thing is by no means consumed), if it was not previously had; or (2) it is not necessarily acquired, even if it was not had beforehand. If the first is given, then, just as the completed act cannot be separated in a thing consumable by use, so another act, which is not completed also cannot (according to him) be separated from ownership or lordship in a thing consumable by use. Consequently, without the consumption of the thing, in things consumable by use, an act of using cannot be separated from ownership or lordship. If the second is given, the appellant's proposition is maintained, namely that someone can use a thing consumable by use without lordship or ownership."

Ultimately, Ockham believed that lordship can remain with the lord as long as the act of consuming takes place—i.e., a long time for clothing, but very little time for food.[111]

### 4.3. *Must Licit Use Be Just?*

The pope denied the idea that a licence of using was distinct from a right of using. But even if there were such a distinction, he argued that the holder of anything less than a right of using could not say any resulting use was "just."[112] The only just use was that done with a right of using. Ockham's answer to the challenge was unique. His decision to bring Aquinas to bear on this issue suggests that he recognized the Aquinian undertones to the pope's argument. Ockham, however, was able to turn this to advantage.[113] The term justice could be used in three basic ways:[114]

J1. pro quadam virtute particulari distincta ab aliis tribus virtutibus cardinalibus, habente materiam specialem distinctam a materia cuiuslibet alterius virtutis cardinalis, secundum quam homo iuste operatur ad alterum;[115]

J2. pro quadam virtute generali, quae vocatur iustitia legalis, quae omnes actus virtutum ordinat ad bonum commune;[116]

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[111] *OND* 41.137–146 (2:526).

[112] See above, p. 59.

[113] As many people have noted, Ockham probably took pleasure in being able to use Aquinas against the pope who canonized him; see, e.g., Shogimen, "Ockham and Terreni," 528–29; Tierney, *Idea of Natural Rights*, 129 n. 83.

[114] What follows is based upon *OND* 60.120–129 (2:557). See Miethke, *Ockhams Weg*, 478–79, and, more recently, Mäkinen, "Rights and Duties," 51–53, and "Moral Psychological Aspects," 513–14. I discussed this aspect of Ockham's thought in "Right to (Ab-)Use," 370–72.

[115] "Justice is taken for a certain particular virtue, distinct from the other three cardinal virtues, having a particular subject matter distinct from the subject matter of each other cardinal virtue, according to which a human behaves justly towards another." Cf. *STh* 2a2ae.58.8 ad 2 (9:16): "Ad secundum dicendum quod, sicut supra dictum est, virtutes cardinales dupliciter accipiuntur. Uno modo, secundum quod sunt speciales virtutes habentes determinatas materias. Alio modo, secundum quod significant quosdam generales modos virtutis"; *STh* 2a2ae.58.2 co. (9:10): "cum nomen iustitiae aequalitatem importet, ex sua ratione iustitia habet quod sit ad alterum: nihil enim est sibi aequale, sed alteri.… Iustitia ergo proprie dicta requirit diversitatem suppositorum: et ideo non est nisi unius hominis ad alium."

[116] "Justice is taken … for a certain general virtue, which is called legal justice, which orders all acts of virtue to the common good." Cf. *STh* 2a2ae.58.7 co. (9:15): "iustitia legalis non est essentialiter omnis virtus, sed oportet praeter iustitiam legalem, quae ordinat hominem immediate ad bonum commune, esse alias virtutes quae immediate ordinant hominem circa particularia bona."

J3. pro debita ordinatione actus ad rationem vel aliam operationem, et ita secundum quosdam vocatur iustitia metaphorice sumpta.[117]

Acts, therefore, may be said to be just or not according to the same scheme. Acts of courage or generosity, for example, may be considered many things, but they are not just in the sense of J1. Similarly, acts may be called just according to J2 when it is elicited or commanded by legal justice. Clearly, acts can only be just in this sense when laws have been established about the action in question. (Driving a car on the right-hand side of the road cannot be just or unjust if no law has been made about which side of the road one is to drive on.) For an act to be just in the third, metaphorical, sense, it need only be good and consonant with right reason.[118]

The purpose of this distinction is to disentangle licit use and John's definition of just use. Hence Ockham concluded that although many licit acts may not be just in the first or second senses of justice, everyone who posits that every human act is morally good or bad would say that every licit act could be just according to J3.

Ockham, then, effectively forestalled the pope's objection by pointing out that positive law and morality are not coextensive.[119] The pope had argued that one needed a right of using—or, for consumables, a right of ab-using—in order for use to be just. Ockham, of course, found this idea preposterous because positive law had no essential connection to morality. positive law either came about through agreements (*pactiones*) between people, or through a ruler's decree (*ordinatio*). If we reconsider that a (any?) *ius fori* established through such pacts and ordinations "is called just," it is actually quite difficult to see any necessary connection with morality. The justness of an action, on the other hand, was often determined by reference

[117] "Justice is taken … for a due ordination of an act to reason or another operation, and thus, according to some people, it is called justice taken metaphorically." See *STh* 2a2ae.58.2 co. (9:10), where reference is made to the (Latin version of the) *Ethica Nicomachea* 5.15; see Gauthier, *Ethica Nicomachea* 3:251 and 4:476–77. Aquinas is quoted at *OND* 60.130–142 (2:557). The point is that it is "metaphorical" because the action need not be done *ad alterum*.

[118] *OND* 60.143–160 (2:557). Cf. *Quodl.* 3.15.89–94 (OTh 9:261): "Dico igitur quod deformitas [here a 'carentia rectitudinis quae debet inesse actui'] non est carentia iustitiae vel rectitudinis debitae inesse actui, sed est carentia rectitudinis debitae inesse ipsi voluntati; quod nihil aliud est dicere nisi quod voluntas obligatur aliquem actum elicere secundum praeceptum divinum quem non elicit. Et ideo rectitudo actus non est aliud quam ipse actus qui debuit elici secundum rectam rationem."

[119] This point has been made before: Leff, *William of Ockham*, 620; Morrall, "Some Notes," 348; and Offler, "The 'Influence,'" 340. In fact, in a perhaps not very lawyer-minded way, Ockham felt the opposite was true; cf. Kölmel, "Das Naturrecht," 85: "Das positive Gesetz ist nicht in sich frei von Rechtlichkeit (Moralität)."

to right reason, which is intimately tied to questions of morality.[120] Actions may thus be "just" and at the same time legally "indifferent" as far as positive law is concerned.

Such is the case with the *licentia utendi*. Naturally, licences can fall under the purview of positive law, but not all need to. As Ockham saw it, a licence had by the grace of someone else could operate outside of the jurisdiction of positive law, provided, of course, that they do not violate existing laws. On the analogy that a prince is "freed" from his own laws, the granter of a licence is likewise not bound by the conditions he sets. Licences are therefore revocable at the whim of the granter. But a licence of using does not grant a right of using; nor are the terms equivalent. The difference is simple: a right of using offers recourse to legal action, while a licence does not.

All a licence offers is the opportunity to make use of our "most general power of using."[121] This power is present whenever we make use of something, and it is the accompanying circumstances which allow us to describe it in different ways. When we make use of something as its owner or as the usufructuary, then this licit power of using is accompanied by a right of using. If our use is impeded, the reason we have recourse to the courts is not because the power of using is something protected by law, but because our claim as owner or usufructuary is. When we make illicit use of something (like a thief does), we are not convicted as such because we have employed this power of using, but because, by doing so, we have infringed upon the rights and claims of others. When we are granted only a licence of using and all the limitations this entails, when we use our innate power of using, if our use is impeded there is precious little we can do about it (other than complain). In other words, Ockham was arguing that (1) because positive law necessarily had to exist within natural law in so far as the former can never legitimately contradict the latter's positive or negative commands, and (2) because there are actions whose justness or liceity depends only on natural law, not all actions need rely on the ordinances or pacts of positive law to be considered just. A licence of using, then, which is "permitted" under natural law, could be licit and just outside of the concerns of positive law. Our power of using, however, is always present—even if it is only licit while the one granting a licence of using says it is.

[120] That is, acts in themselves are morally neutral, and it is the agent's intentions which are good or bad (*Quodl.* 1.20 [OTh 9:99–106]). Cf. King, "Ockham's Ethical Theory," 229, and McGrade, *Political Thought*, 186.

[121] *OND* 4.192–217 (1:333–34). Cf. Mäkinen, "Moral Psychological Aspects," 524–25.

In this sense, an act of using may be morally good and consonant with right reason, and therefore just in the third sense, *even if* positive law were to insist that use and lordship of a thing can not remain forever separate (i.e., the act of using a consumable without lordship would not be just in the second sense). One may question how well Ockham answered John's argument, and no doubt the pope would hardly be satisfied, but this solution was certainly more workable than some modern commentators believe. His solution was certainly the most complete. Michael had claimed that licences were not rights; Francis had argued that there was a spiritual 'right' of using not part of positive law; Ockham built on their foundations, however, and pointed out a whole realm where positive human law made no judgment about the justness of human actions.

CHAPTER SEVEN

# CORPORATE POVERTY

Poverty was, without a doubt, the most conspicuous feature of the Franciscan *modus vivendi*. The friars themselves were divided on the issue of personal poverty. Yet it was not personal poverty that really distinguished the Franciscans from the other mendicant orders. It was rather their corporate poverty that set them apart. John XXII denied that this was the case, that it could even be the case. We have already discussed his claim that an Order could not have use of fact, only a use of right. He thought his point was obvious: since an Order is merely a *persona representata et imaginaria*, only "things of right" can belong to an order, not "things of fact."[1] This study of Ockham's theory of property rights would be incomplete, then, if we did not consider this relatively unstudied aspect of the Michaelist theory of property rights.

## 1. *The Origins of Franciscan Corporate Poverty*

The origins of Franciscan corporate poverty can be found in both the *Regula bullata* and the *Testamentum* of St Francis. In the first case the brothers are ordered to shun the appropriation of things large or small, that is, even things that could conceivably be owned on the corporate level (*nec domum nec locum nec aliquam rem*).[2] In the *Testamentum*, St Francis came down even more strongly against corporate ownership: "Caveant sibi fratres, ut ecclesias, habitacula paupercula et omnia, quae pro ipsis construuntur, penitus non recipiant, nisi essent, sicut decet sanctam paupertatem, quam in regula promisimus, semper ibi hospitantes sicut advenae et peregrini [cf. 1 Pt. 2.11]."[3] St Francis's message was not lost on subsequent generations of

[1] See above, p. 52. Throughout this chapter I use "Order" to keep in view the fact that we are dealing with the Franciscan Order as a corporate entity.

[2] *Regula bullata* 6.1 (231).

[3] *Testamentum* 24 (312): "The brothers should ensure that they entirely avoid the receiving of churches, poor dwellings, and everything built for them unless they be appropriate to holy poverty, which they have promised in the *Rule*—always staying there as pilgrims and guests."

Franciscan authors. Although Gregory IX declared that the *Testamentum* was not binding only a few years later, he did so while affirming the Order's corporate poverty. Fifteen years later, in 1245, Innocent IV said much the same thing.[4] In this way, though perhaps not in so straightforward a manner, the doctrine of Franciscan corporate poverty found papal approbation.[5]

For many critics, it was the idea of corporate poverty that seemed most problematic. The problem was none too subtle: if the friars did not own the things they used, who did? Innocent IV aimed to settle questions like these. Gregory had rather unhelpfully explained that the lordship of the places and houses belongs to those "to whom it is known to pertain" (*ad quos noscitur pertinere*) and that the friars were unable to sell, exchange, or otherwise alienate movable goods without the permission of the Cardinal in charge of the Order (*ordinis gubernator*), or one of the leaders of the Order.[6] Though he has often been criticized for missing the point when it comes to Franciscan poverty,[7] on this point at least, Innocent's "fuller clarification" seems common-sense enough. As he explained, the friars must not exchange these goods, because the *ius, proprietas, et dominium* belong directly to the Church except where the donors wish to retain lordship and ownership.[8]

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[4] The similarities are striking, especially because of the ways Innocent modified the other parts of the bull. The following is adapted from Pásztor, "Francescanesimo," 111:

| *Quo elongati* | *Ordinem vestrum* |
|---|---|
| Dicimus itaque, quod nec in communi nec in speciali debent proprietatem habere, sed utensilium et librorum et eorum mobilium, que licet habere, ordo usum habeat.… (Grundmann, "Die Bulle," 22, lines 82–85) | Dicimus insuper, quod … nec in communi, neque in speciali debent proprietatem habere; sed *locorum, et domorum*, ac utensilium, et librorum, et eorum mobilium, quae licet habere, Ordo habeat usum. (BF 1:401a [no. 114]) |

The attentive reader will note Innocent's addition of "places and houses" in the list of things the brothers "have the use of," which would appear to be somewhat in opposition to the *Regula bullata*. See Elizondo, "Bullae" for an exhaustive discussion of both *Quo elongati* and *Ordinem vestrum*.

[5] See, e.g., the anecdote of Thomas of Celano, *2 Celano* 2.28.58 (FF, 497), where St Francis refused (*ca.* 1219–21) to allow the brothers use a house in Bologna until the Bishop of Ostia publicly claimed that the house was his; mentioned by Little, *Religious Poverty*, 164. There is some irony in the fact that it was at Bologna where one of the earliest distinctions between *dominium* and *usus* was made.

[6] *Quo elongati* 85–91 (22–23).

[7] Cf. Brooke, *Early Franciscan Government*, 250–51, Moorman, *History*, 117, and Pásztor, "Francescanesimo," 108. For analysis of *Ordinem vestrum*, see Damiata, *Povertà e potere* 1:112–25, and Lambert, *Franciscan Poverty*, 101–07. From a related perspective, see Mueller, *Privilege of Poverty*, 96–97.

[8] BF 1:401b (no. 114): "cum tam immobilium, quam mobilium huiusmodi ius, proprietas,

This was a development of Gregory's position, for while Gregory was willing to assume by "to whom it is known to pertain," everyone would understand the same thing, Innocent felt the need to say explicitly who the owner was for any good the Franciscans used: either the donor who wanted to keep ownership and lordship, or the Church itself—not, that is, the Franciscans.[9]

It is tempting to speculate about the reasons for Innocent's addition, both here and in the other aspects of *Ordinem vestrum* that were not as well received by the Order.[10] But in the case of accepting the "right and ownership," the answer is probably simple enough: "In this way [Innocent] put an end to a nagging question with which critics of the Order had easily disturbed the brothers. Who owned the bucket with which the brother carried out the kitchen swill? The pope did."[11] The rationale and effect of Innocent's move is easy to understand, but it could also be described in a more technical sense: the pope was, in fact, forestalling the possible objection that one became the owner merely by using an unowned thing, a *res nullius* in Roman law.

The basic problem was that a thing was generally considered abandoned if the former owner had no intention to retain ownership of the thing in question.[12] Although physical possession of a thing available for acquisition was

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et dominium (illis solis exceptis, in quibus expresse donatores, seu translatores sibi proprietatem, et dominium reservasse constiterit) nullo medio ad Ecclesiam ipsam spectent; cui domus, et loca praedicta cum Ecclesiis, ceterisque suis pertinentiis (quae omnia in ius, et proprietatem Beati Petri suscipimus) omnino tam in spiritualibus, quam temporalibus immediate subesse noscuntur."

[9] Moorman, *History*, 120, and, recently, Bartocci, *Ereditare in povertà*, 300–01, have stressed the significance of this change. Cf. Lambert, *Franciscan Poverty*, 106–07: *Quo elongati* "had set it down that the friars were obliged by their Rule to make a total renunciation, as an Order, of all forms of dominion or property rights. [*Ordinem vestrum*] had put forward a theoretical system, a legal fiction indeed, which would enable the Order to observe this total renunciation."

[10] See, e.g., the *Diffinitiones narbonensis*, n. 13, in Delorme, "Diffinitiones," 503: "Declaratio domini Innocentii maneat suspensa, sicut fuit in capitulo Methensi [1254]; et inhibemus districte, ne aliquis utatur ea in hiis, in quibus declarationi domini Gregorii [sc. *Quo elongati*] contradicit." However, we never get the sense that the papal *retentio dominii* was one of these points. Bartocci, *Ereditare in povertà*, 305–06, provided examples where the prohibitions were not followed. Subsequent papal declarations repeated the claim—e.g., Clement IV, *Cum dilecti* (25 July 1265), BF 3:24b (no. 26); Gregory X, *Voluntariae* (5 November 1274), BF 3:222b (no. 58); Martin IV, *Exultantes in Domino* (18 January 1283), BF 3:501b (no. 40)—and the Michaelists, at least, were keen to cite them; see *App. mon.*, 846–47, and *OND* 71.159–177 (2:597–98).

[11] Flood, "Franciscan Poverty," 14.

[12] Cf. Inst. 2.1.47: "si rem pro derelicto a domino habitam occupaverit quis, statim eum dominum effici. Pro derelicto autem habeur, quod dominus ea mente abiecerit, ut id rerum suarum esse nollet, ideoque statim dominus esse desinit." A gloss to this passage (s.v. "ideoque statim") notes: "Licet quidam putauerint non desinere, nisi ab alio possessa fuerit, ut in

only one of the two necessary criteria for establishing ownership—the other being an intention to acquire ownership[13]—it was the prior consideration. Now, however, even if it were argued that a friar *wanted* to claim ownership of the slop bucket, he had no legal claim to it. Innocent's *retentio dominii* thus served as a clear legal buffer against one avenue of attack against the theory of Franciscan poverty.

We should assume that Innocent IV knew what he was doing, for he was no mean jurist. Indeed, Innocent is well known for his role in the development of medieval corporation theory.[14] It is an interesting coincidence that in the very same year that he reserved "ius, proprietas, et dominium" of the things the Order had the use of,[15] he also denied the possibility of excommunicating a corporation since corporations "are names of the law (*iuris*) and not of persons" and therefore could not commit an offense or delict (*delinquat*).[16] It is highly likely that when John XXII claimed that an Order was, *in iure*, nothing more than a *persona ficta et repraesentata*, he at least thought he was arguing along lines Innocent would have approved of. Thus, it seems appropriate to frame the Michaelist response to John's position in the context of Innocent's theory of corporations.

## 2. *Innocent IV & Corporation Theory*

A preliminary remark is in order regarding the so-called fiction theory. Fascinating as they are, we shall not get mired in the old-fashioned debates between the "realist" and "fiction" theory of corporations.[17] However, as

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Dig. 41.7.2" (Caprioli et al., *Glosse preaccursiane*, 91). Inst. 2.1.48 stresses the importance of the *intention* to abandon: in the case of things thrown overboard during a storm, since the owner's intention was to escape the storm, not abandon ownership of them, these goods were not *res nullius*.

[13] See above, p. 128.

[14] Innocent's views on property rights are also worth looking at; see Tierney, "Religious Rights," 28, and *Idea of Natural Rights*, 143–44, for some general observations.

[15] Above, p. 256 n. 8.

[16] Innocent, *Comm.* ad X 5.39.52(53), n. 1 (557[559]rb): "uniuersitas autem non potest excommunicari, quia impossibile est, quod uniuersitas delinquat, quia uniuersitas, sicut est capitulum, populus, gens, et hiusmodi nomina sunt iuris, et non personarum, ideo non cadit in eam excommunicatio." Cf. *Comm.* ad X 1.38.15, n. 4 (172va–b). See Black, "Individual and Society," 599, for the year.

[17] See the classic account in Maitland's introduction to his translation of Gierke, *Political Theories*, xiv–xliii. Michaud-Quantin, Universitas, 210, thought it was *un faux problème*, or at least a badly posed problem; cf. Tierney, "Canon Law," 58–59, and Canning, "Corporation," 17–19.

there is much truth to the claim that Innocent was a proponent of *a* fiction theory, if not "*the* Fiction Theory,"[18] I shall continue to employ this terminology.

The fiction theory, in the medieval sense, is described as such because the corporation—the *uniuersitas* to use the most generic term—as such is merely a fiction of the law.[19] The source for the claim that Innocent was an adherent of this view comes from a comment on a decretal that is not actually a part of the *Liber extra*.[20] For our purposes the content of the decretal is more important than its status in the official version of Gregory's *Decretales*, viz, a decision regarding the lawsuit between two monasteries over a question of corporate poverty. One issue involved the swearing of oaths. Could an abbot or prior swear an oath in his own name and on the the souls of their convents (*nomine suo et in animas conventuum eorundem*)? Innocent first stressed that the one swearing the oath had to follow the will of the majority.[21] He then went on to write that it makes sense for the *animae conventuum* to swear through one person if they wish "since, in a matter concerning the corporation, a college is treated as one person."[22] Innocent also made a similar point with specific reference to a *uniuersitas religiosorum*. Religious corporations can also swear through someone else; this is, in fact, the normal way of doing things: a procurator introduces the lawsuit and another person (*principalis persona*) swears and responds in the case.[23]

[18] Rodriguez, "Innocent IV," 312 (his emphasis); my understanding of Innocent's position owes much to this incisive article. An important overview is Michaud-Quantin, Universitas, 206–11, as part of his larger survey of medieval corporative terminology. One should also consult Ullmann, "Delictal Responsibility"; for general remarks, see Canning, "Law, Sovereignty and Corporation Theory"; Pennington, "Law, Legislative Authority," 444–49; and Tierney, *Growth of Constitutional Thought*, 19–28, 80–87. Further references may be found in Pennington, "Representation," and Maiolo, *Medieval Sovereignty*, 244 n. 57.

[19] In the commentary tradition to Aristotle's *Politics*, the preferred term was *civitas* or *communitas*, but this is a more specialized usage deriving ultimately from the early Moerbeke translation (for *koinonia*). See Quillet, "*Universitas populi* et représentation," 188–89; cf. "Community," 526–27.

[20] In Innocent's commentary, there are two extra decretals added to X 2.20 (*De testibus et attestationibus*). For the details of this confusion, see Rodriguez, "Innocent IV," 309–10.

[21] Innocent, *Comm.* ad X 2.20.57, n. 4 (270va).

[22] Innocent, *Comm.* ad X 2.20.57, n. 5 (270vb): "hodie licitum est omnibus collegiis per alium iurare, et hoc ideo, quia cum collegium in causa uniuersitatis fingatur una persona, dignum est, quod per unum iurent, licet per se iurare possint, si velint. Cod. 2.58(59).2.5. Et etiam propter facilitatem ponendi, et respondendi, alias autem quilibet per se in animam suam iurare debet."

[23] Innocent, *Comm.* ad X 2.1.14, n. 3 (194rb): "In uniuersitate autem religiosorum, non est dubium, quod per alium iurare potest. Infra, X 2.7.1. Ipse respondebit secundum quod maio-

These passages illustrate well at least part of John XXII's claim: certainly an Order is, according to Innocent, a "represented" person insofar as it is something that can be represented by one person.[24] But to determine whether he thought it was also an "imaginary" person requires further attention.

In Innocent's view, though it may be thought of as one person in certain circumstances, a corporation is not really a person. It cannot, as we have seen, be excommunicated.[25] He went on to explain that excommunicating a corporation would entail condemning the innocent along with the guilty, and he raised the objection that such an action would be inequitable.[26] It seems, then, that while a corporation can be represented legally, even as a person in certain capacities, he also believed, with Accursius, that a corporation was no more than the people who comprised it: "uniuersitas nihil aliud est nisi singuli homines qui [ibi] sunt."[27] Innocent seems to have thought more or less the same thing, for he wrote that a chapter can only act through its members; as a thing, a chapter was merely an intellectual term, an incorporeal thing: "capitulum, quod est nomen intellectuale, et res incorporalis, nihil facere potest, nisi per membra sua."[28] At the same time, however, it *seems* that Innocent believed it could appear as an defendant in civil suits. According to Innocent, "uniuersitas non potest accusari, nec puniri, sed delinquentes tantum; ciuiliter autem conueniri et pecuniariter puniri possunt [potest?] ex delicto rectorum, ut in contrariis, et supra X 5.3.19."[29]

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ri parti placuerit; nec mirum si per alium, quam qui litem contestatus est iurat, et respondet cum hoc generaliter obtineat, quod procurator litem contestatur, et tamen principalis persona iurat, et respondet."

[24] Cf. *App. mon.*, 750, where Michael described Peter as swearing on behalf of the other apostles : "… ut habetur Matthaei 19, 21, Marci 10, 28 et Lucae 18, 28, Petrus, in persona apostolorum, ostendens se et apostolos perfecte adimplesse consilium perfectionis evangelicae datum illi iuveni cui Christus dixerat [Mt. 19:21]: *Si vis esse perfectus, vade et vende omnia quae habes et da pauperibus* etc., respondit [Mt. 19:27]: *Ecce, nos reliquimus omnia et secuti sumus te* etc." See also *App. mon.*, 773.

[25] See p. 258 n. 16, above, and Miethke, *Ockhams Weg*, 503–04.

[26] Innocent, *Comm.* ad X 5.39.52(53), n. 2 (557[559]rb–va). See Rodriguez, "Innocent IV," 299–301, and Michaud-Quantin, Universitas, 333, for an elaboration of this point.

[27] *Glos. ord.* ad Dig. 3.4.7.1, s.v. "non debetur." The version of the gloss cited in Canning, "Corporation," 12–13, includes "ibi." See Michaud-Quantin, Universitas, 206–07 for discussion.

[28] Innocent, *Comm.* ad X 5.39.64, n. 3 (564rb). This is part of a longer section that begins by noting that when a chapter is compelled to do something, we understand that to mean that the members of the chapter are compelled. On *nomen intellectuale*, see Michaud-Quantin, Universitas, 43, 207, and 210.

[29] Innocent, *Comm.* ad X 5.3.30, n. 1 (500va–b): "a corporation cannot be prosecuted or punished, only the delinquent persons; however, they [it?] can be sued in a civil case, and fined for the delict of the rectors." The unpaginated Venetian edition of 1495 also has *potest*,

What, then, should we say of Innocent's views about the nature of a corporation? It is certainly true that Innocent was more interested in discussing corporations in relation to the practical problems of ecclesiastical administration than in elaborating an abstract theory of their metaphysical status,[30] yet this is not to deny that the rudiments of such a theory might lie scattered throughout his writings. As it turns out, Innocent described two types of corporate entities. In a comment on the phrase "unum corpus" in a decretal about the establishment of a college, Innocent explained the difference. There are *collegia personalia*, which are comprised of professions, business associations, and religious orders; these are voluntary rather than necessary corporations. Necessary and natural colleges are those that form by reason of origin or residence, such as colleges of a city, town, or church. But, Innocent clarified, this is not a distinction held *in iure*, it is only said by analogy to real and personal servitudes.[31] This analogy is suggestive, but ultimately of little use. Servitudes in Roman law were classified as *iura in re aliena*, rights over another's property, which were vested in the beneficiary as a right attached to the immovable property. Personal servitudes, unlike praedial servitudes,[32] could not be alienated to another, and tended to be extinguished upon the death of the beneficiary. Usufruct, (bare) use, and habitation were all classified as personal servitudes in Roman law. In the *Institutes*, as we have seen, *usus nudus* is said to be established and extinguished in the same way usufruct is; there is, however "less right" in use than usufruct; one who has the use of a house, for example, is considered to only have a use of right, which is non-transferable.[33]

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as does Rodriguez, "Innocent IV," 304 (using a Venice, 1570 edition), who concluded that a corporation "can be cited as a defendant in a civil suit in tort." Elsewhere, I had argued against Rodriguez's reading, but the text from this earlier edition has swayed me in the other direction; see Robinson, "Innocent IV, John XXII," 205 n. 40.

[30] See Tierney, *Foundations*, 94–97, for some apposite cautionary remarks on this point.

[31] Innocent, *Comm.* ad X 5.31.14, nn. 4, 5 (526va): "Item uidetur quod haec collegia personalia, scilicet, professionum, negotiationum officiorum, et religionum sunt uoluntaria, et non necessaria.… Quod autem praedicta collegia appellantur personalia uel realia, non habetur in iure, sed per simile dicitur numerum seruitutum realium et personalium, secus autem est in collegiis realibus, ut ciuitatis et burgi, et ecclesiae, quae sunt necessaria et naturalia, qualia sunt, quae ratione originis, uel ratione domicilii, uel aliis consimilibus rationibus contrahuntur." See Rodriguez, "Innocent IV," 292–94.

[32] We should assume that Innocent was referring to praedial servitudes when he wrote of "real" servitudes. A praedial servitude—*servitutes rerum*, *iura praediorum*—tended to be for the economic exploitation of some immovable property. See further p. 71, above.

[33] Inst. 2.5 pr.–2. Cf. Dig. 7.8.1 and 7.8.8.

A proper understanding of servitudes, then, surely helps us understand what John meant about the Order's use being a use of right, and that this was tantamount to a right of using,[34] but it does not really help us understand why a *collegium religionum* is *personale*. As Michaud-Quantin wrote, the idea is that personal colleges are voluntary, while real ones are necessary in the sense that one cannot 'opt out' of it.[35] The analogy to servitudes is perhaps less helpful, but presumably the point is that a religious college is "personal" in that it inheres in the people who choose to join it, much like personal servitudes belong only to the individuals who hold them; but "real" colleges (cities, towns, churches) inhere in the place itself, just as do praedial servitudes. But this only brings us back to Azo's point that a corporation, whether chosen or natural, is simply made up of those who are there.

We can get closer to our goal, however, if we consider what Innocent had to say about the agents of a corporation, particularly of these *collegia personalia*. These groups of people naturally had common goals and interests, and it was important for the decretalists to explain how these interests could be represented.[36] One example Innocent dealt with was that of a cleric representing his prebend. Innocent thought it was only natural for a cleric to be able to sue on behalf of his prebend because, according to the *Digest*, a beneficiary of a usufruct is a person who can sue. Moreover, a prebend itself can have its own *iura* and *possessiones*, just as a bishopric, abbey, hospital, house, dignity, or administration can.[37] Naturally, a prebend requires some sort of agent for it to act, but it is equally clear that "a certain personality is predicated" of it as well.[38] In another comment to the same decretal, Innocent made the comparison between a *prebendarius* and a *ususfructuarius* even more explicit.[39]

In summary, then, a religious college or corporation, a *collegium personale*, exists in analogy to a personal servitude, and the agent of this college is

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[34] Above, p. 47.

[35] Michaud-Quantin, Universitas, 211.

[36] See the discussion in Rodriguez, "Innocent IV," 305–15.

[37] Innocent, *Comm.* ad X 2.19.3, n. 1 (248ra–b): "Nota clericos pro praebendis suis posse agere et conueniri, nam ususfructuarii sunt qui agere possunt. Dig. 10.1.4.9. Sed dices quoniam [*quomodo*] aget nomine praebendae cum praebenda nihil habeat uel possideat? Respondeo, imo haec praebenda potest habere iura sua et possessiones, sicut episcopatus, abbatia, hospitale, uel quaecunque alia dominus [*domus*] uel dignitas, uel administratio." The text is corrupt here. I read *quomodo* for *quoniam* and *domus* for *dominus*. Rodriguez, "Innocent IV," 306, has *quodmodo* (a typo?) and *domus*.

[38] Rodriguez, "Innocent IV," 306.

[39] Innocent, *Comm.* ad X 2.19.3, n. 3 (248rb): "Et satis dicimus posse dari inter praebenda-

analogous to one who holds a personal servitude (usufruct in this case). Servitudes are, moreover, rights of a sort, "lesser real rights" according to one classification.[40] There is thus a temptation to think that Innocent thought of a corporation, at least in the case of a *collegium personale*, as an entity that simply signifies a group of men brought and bound together by a common cause, and which is in a sense the summation of the rights and possessions that are vested in the individuals of the group,[41] even if they are distinct from the rights and possessions of any one individual of the group.[42] However, this group can be treated of as a person for the express purpose of thinking about the shared rights and interests that are vested in the group. It is a legal "person," and it can be represented, but it is not "real." If this was what John meant by "imaginary," then Innocent probably would have agreed with him.[43]

### 2.1. Ordinem vestrum *Reconsidered*

The preceding analysis also sheds some light on some of the elements of *Ordinem vestrum* that the Franciscans were not so keen on, namely Innocent's pronouncements regarding the Order's agent (*nuncius*), his official and *de facto* relationship with the Order, and his general powers.[44] As we

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rios ad similitudinem usufructuarium."

[40] Miller, "Property," 65.

[41] In Baldus's *Margarita* for Innocent's commentary, we read regarding the pope's commentary to X 5.39.52(53) (see p. 258 n. 16, above), he explained that a *uniuersitas* "non est aliud quam homines qui in eo sunt, scilicet cum addito iuris intellectu, et addita significatione quae ex uniuerso sumitur." (The *Margarita* is appended to Innocent's commentary but unpaginated; the reference here comes from the penultimate page.) Bartolus made a similar point; see Ullmann, "Delictal Responsibility," 86–87, and Miethke, *Ockhams Weg*, 506 n. 206.

[42] Berman, *Law and Revolution*, 216 and 220.

[43] It is important to note that Innocent devoted far more space here to the question of swearing *de veritate dicenda* and accurately and honestly representing the group than to the few lines about thinking of the college as one person.

[44] Pásztor, "Francescanesimo," 110–11, has highlighted the differences in a very straightforward fashion. I follow her schematization here:

| *Quo elongati* | *Ordinem vestrum* |
|---|---|
| … si rem sibi necessariam velint fratres emere … possunt. | … possunt tamen, si rem sibi necessariam, *aut utilem* velint emere. |
| … qui taliter presentatus a fratribus non est eorum nuntius, licet presentetur ab ipsis, sed illius potius, cuius *mandato* solutionem facit. | … taliter praesentatus a Fratribus non est eorum nuncius, licet praesentetur ab ipsis, sed illius potius, cuius *auctoritate* solutionem facit. |
| Idem tamen nuntius solvere statim debet, ita | — |

have seen, Innocent saw no theoretical difficulties in having someone act on behalf of a corporation. Clearly, as both *Quo elongati* and *Ordinem vestrum* demonstrate, this was what the agent was meant to do. In each case, the agent may actually have been presented by the brothers, but he was not, *de iure*, an agent *of* the brothers. The real difference here between the bulls (aside from the fact that Innocent allowed these agents to procure "useful" things in addition to the needs of the Order) is that whereas before the agent could deposit the alms *sicut dominus* with a spiritual friend, Innocent said the agent could hold onto the alms himself *sicut dominus*, or hand them over to a "spiritual friend" that the Order could nominate if they wished. Additionally, while *Quo elongati* implies that the spiritual friend determined the expediency of using the alms for their needs, *Ordinem vestrum* claims the brothers themselves determined what was expedient (or even just useful); they could even decide to have him transfer the alms to another person or location.

In light of what Innocent said in his *Commentary* about corporations, I think we must read him to have been thinking of rights. It harmonizes well with what we have seen regarding his corporation 'theory.' The agent acts on behalf of a college to represent faithfully the wishes of the college. In this case the agent is to secure what the college—the members of the college—deem necessary or useful. His subsequent bull, *Quanto studiosius* (1247), makes this all the more obvious. This bull reiterated the claim of papal ownership, but it also, noting that the Order had to have frequent recourse to the Apostolic See because of this arrangement, allowed the brothers to establish and remove men, as often as it seemed advantageous, who have "the power to seek, sell, exchange, alienate, manage, spend, buy, and convert"

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quod de pecunia nichil remaneat penes eum.

Si vero pro aliis imminentibus necessitatibus presentetur, elemosinam sibi commissam potest sicut et dominus apud spiritualem vel familiarem amicum fratrum deponere, per ipsum loco et tempore pro ipsorum necessitatibus sicut expedire viderit dispensadam. (Grundmann, "Die Bulle", 22, lines 63–74)

Si vero pro aliis Fratrum necessitatibus, *aut commodis nominetur aliquis*, vel praesentetur ab eis, potest ille commissam sibi eleemosynam, sicut Dominus *conservare*, vel apud spiritualem, vel familiarem amicum Fratrum *nominatum, vel non nominatum ab ipsis* deponere, per eum loco, et tempore pro ipsorum necessitatibus, *vel commodis*, sicut Fratres expedire viderint, dispensandam, *seu etiam ad personam, vel loca alia transferendam*. (BF 1:400b [no. 114])

things for the friars' use (*in usum*).[45] There were additional clauses about need and expediency, but, overall, one is reminded of Innocent's point that "uniuersitas etiam proprie dicitur constituere procuratorem in re propria uniuersitatis.… Item actorem constituit uniuersitas in rebus non suis."[46]

As far as I can tell, Innocent did not comment on *ius* or *usus* in a way that would be of interest to the polemicists involved in the poverty controversy (or the historians who study them). Unfortunately, it does not look as though he commented on X 5.40.12.[47] However, this much seems clear. When it suited the discussion, Innocent was not opposed to thinking about a corporation as a "person" who could be represented before the law, even if we must always remember that a corporation is not really something separate or above the people who comprise it. Yet if a college is to be considered on the analogy of a servitude, it seems that what the agent of the college represents is to be thought of in terms of rights.

### 3. *Bonagratia of Bergamo*

Now that Innocent's position is sufficiently clear, we may turn to the Michaelist account of the relationship a 'use of right' must have with corporations. It is not immediately apparent whether Francis and William, perhaps even Michael, realized it, but they were faced with a far greater quandary than they let on in their writings. The problem was that Bonagratia had already

[45] *Quanto studiosius* (BF 1:487–88 [no. 235]): "Cum enim … oporteat vos propter hoc semper ad Sedem Apostolicam, ad quam rerum ipsarum spectat proprietas, habere recursum; Nos quieti dicti Ordinis, et necessitatibus vestris paterna volentes sollicitudine providere, praesentium vobis auctoritate concedimus; ut singulis vestrum liceat in Provinciis eis commissis per se, vel per alios Fratres suos, quibus id duxerint committe dum [*read:* committendum], constituere aliquos viros idoneos Deum timentes, qui pro locorum indigentia singulorum res huiusmodi tam concessas, quam etiam conferendas auctoritate Nostra libere petere, vendere, commutare, alienare, tractare, expendere, vel permutare, ac in usum Fratrum convertere valeant secundum dispositionem vestram pro necessitatbus, vel commodis Fratrum Ordinis memorati, sicut vobis pro loco, et tempore videbitur expedire; liceat quoque vobis eosdem viros sic constitutos a vobis amovere, aliosque ad praemissa exequenda sine difficultate qualibet subrogare, quoties videritis opportunum." Not without reason does a marginal gloss to this passage read: "Auctoritas instituendi Syndicos cum ampla facultate!"

[46] Innocent, *Comm.* ad X 2.7.5, n. 2 (211rb): "a corporation is even properly said to establish a procurator for the corporation's own affairs.… Similarly, a corporation establishes an agent for affairs that are not its own."

[47] X 5.40.12: "Ius dictum est a iure possidendo. Hoc enim iure possidetur, quod iuste, hoc iuste, quod bene; quod autem male possidetur, alienum est. Male autem possidet, qui vel suis male utitur, vel aliena praesumit." Innocent's *Commentary* lists it as 5.40.11 [566va]. Another, unpaginated, edition (Venice, 1495) is also empty. See also p. 60 n. 160, above.

said what John would later say in *Quia quorundam* regarding a *usus iuris* in his *Tractatus de Christi et apostolorum paupertate*.

The chronology is important in this case. Written some months before the first version of *Ad conditorem* was published, the treatise was meant to answer the question of whether it was heretical to say that Christ and the apostles had nothing individually or in common. As he saw it, the question could be asking three very different things. To review, "Habere aliquid" might mean: (H1) to obtain something by right of lordship (or quasi-lordship), or ownership, and in this case a thing may properly be said to be an individual's or a college's; (H2) it could also be taken in a broad sense, such as someone who holds a thing *de facto* or "ad usum simplicem facti," where there is no claim to the right of lordship or ownership; or (H3) someone is said to have a thing because he has administration of it.[48] Bonagratia ended up rejecting the last two modes as candidates for the question, but the reason he gave for rejecting them is crucial for his corporation theory. It could not be about these last two modes, he reasoned,

> quia etsi detinere res de facto seu uti rebus simplicis facti usu, aut amministrare res aut dispensare, vel per modum custodie seu depositi tenere, possit competere pluribus ut singularibus, non tamen potest competere collegio sive universitati. Nam quamvis in hiis que iuris sunt, seu que spectant ad ius hereditatis, collegium et universitas vicem persone obtineant, Dig. 46.1.22(!) et 46.1.73(!), Dig. 45.3.1 pr., in hiis que facti sunt, seu in quibus factum persone requiritur, sive ubi sine certa persona quid fieri non potest, non obtinet collegium vicem persone Dig. 41.1.34.[49]

In his desire to show that the pope's question had to be about "having something" in the sense of property rights, Bonagratia insisted that corporations could only hold the place of a person in matters of *ius*.

In the remainder of the tract, Bonagratia spoke about the "collegium apostolorum" in connection with having things in the first sense of *habere res*.[50] Therefore, although Bonagratia said further on in the treatise that Christ's

[48] See above, p. 177.

[49] *De paup.*, 325–26: "because even if 'detaining something de facto' or 'using things by a use of simple fact' or 'managing things or exercising stewardship,' or 'holding them through the mode of guardianship or a trust' can belong to many as individuals, it still cannot belong to a college or a corporation. For, although in things which are of right, or pertain to the right of inheritance, a college and corporation may obtain the place of a person … nevertheless in things which are of fact, or in which the action (*factum*) of a person is required, or where something cannot be done without a definite person, a college does not obtain the place of a person." See Brunner, "Pope John XXII," 231, and Wittneben, *Bonagratia von Bergamo*, 127.

[50] *De paup.*, 488–89, 493–94, 507.

precept against possessing gold, silver, or money was to be understood *distributive et etiam collective*, such that both individual apostles and the whole college of apostles were forbidden to possess gold, silver, or money,[51] and although he said that a slave, a *filiusfamilias*, or a religious has only simple use of fact,[52] it would seem that Bonagratia held, along with the pope, that an Order, though maybe not merely 'imaginary,' could only 'have' a use of right. It is somewhat surprising that John did not mention that Bonagratia seems to have held the same opinion that he defended in *Quia quorundam*.

Bonagratia did not leave it at that, however. First he located use of fact within the sphere of *ius naturale*. He even twisted a famous passage of Roman law to suggest that nature taught all animals "this use."[53] A use of fact of this sort is thus irrenounceable. Bonagratia took the standard view that since everyone is obliged to preserve his or her own life, everyone is also unable to renounce the things without which they could not live.[54]

The second step was to redefine the corporation that owned the goods the apostles used so that it included all of the faithful. Buried in a mass of legal references, Bonagratia answered the vexing question of ownership:

> Si vero dicatur: Cuius ergo erat dominium rerum, quibus utebantur apostoli? … Et res ecclesie non dicuntur alicuius singularis hominum vel hominis vel collegii, set quasi communes universitatis omnium fidelium que est corpus Christi: C. 12 q. 1 c. 26 et c. 28; et nota per Innocentium, X 2.12.4. Sic et dominium sive proprietas rerum, quibus utebantur apostoli, erat universitatis omnium fidelium sive bonorum. Nam iure divino omnia sunt bonorum C. 23 q. 7 c. 1.[55]

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[51] *De paup.*, 495: "Et ideo preceptum datum apostolis de non possidendo aurum nec argentum neque pecunias, intelligi debet prout stare potest pro suis suppositis distributive et etiam collective, interdicendo non solum cuilibet singulari, set toti collegio aposotolorum possessionem huiusmodi."

[52] *De paup.*, 502.

[53] *De paup.*, 503: "Preterea usus facti rerum necessariarum ad substentationem nature est de iure naturali, eo quod *ab exordio rationalis* creature incepit D. 5 d.a.c. 1; D. 35 c. 7, et eo quod ubique et apud omnes instictu nature, non ex constitutione aliqua habetur, ut in D. 1 c. 7, et eo *natura* hunc usum *omnia animalia docuit*, Inst. 1.2 pr., Dig. 1.1.1.3."

[54] *De paup.*, 503.

[55] *De paup.*, 505–06: "The things of the Church are not said to be of any single person, whether one man's or a college's, but are, as it were, common to the corporation of all faithful, which is the body of Christ: C. 12 q. 1 c. 26 and c. 28; and noted by Innocent [III] in X 2.12.4. Thus the lordship or ownership of things, which the apostles used belonged to the entirety of all the faithful or to the good men. For by divine law all things belong to good men: C. 23 q. 7 c. 1." Cf. *App. ACC*, 93; noted by Miethke, *Ockhams Weg*, 380.

In this way, Bonagratia was able to provide an account of what we might call the "natural use" of the apostles while relocating the ownership of these goods within the larger community. Unfortunately, the analogy was not as fitting for the Franciscan situation. The difference between the two groups was that phrase "Ordo habeat usum": no one granted the college of apostles a use, whether of fact or of right, the way thirteenth-century popes did the Franciscans. Bonagratia's *De paupertate* thus hinted at the problem of corporate poverty, and began to answer it, but it did not have an answer to the dilemma John XXII would pose in *Quia quorundam* and *Quia vir*.

## 4. *Michael of Cesena*

The significance of John's criticism of the idea of corporate poverty was not realized right away.[56] In his Pisan appeals, however, Michael responded to John's adoption of Bonagratia's argument. In the *Appellatio minor* Michael gave a simplified version of what Bonagratia had said. The bull *Cum inter* declared two basic claims heretical: to say that Christ and the apostles did not have some things individually or in common; and to say that they did not have any right of using, selling, donating, or acquiring the things Scripture says they had. This is the subject of the sixth error described in the *Appellatio minor*, which, as Michael saw it, had to do with the problem of the apostolic college. Michael naturally understood the *ius* in question to be one based in positive law (and thus litigible).[57] With a reference to the ubiquitous *Dilectissimis*, Michael concluded that the passage in Acts 4:32–35 (or 2:44–45) did not refer simply to the community or college of apostles. Echoing what Bonagratia had already written, he concluded that Acts had to refer to the general and universal community of believers because if these so-called common goods were appropriated to the apostle's specific college, then these goods could not be common to the whole multitude of believers, "for what is of a part is not of the whole."[58]

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[56] In the *Appellatio Michaelis in Avenione*, e.g., there is no discussion of corporate poverty beyond the general claim that the Franciscans' vow to have nothing *tam in speciali quam in communi* had the approval of both *Exiit* and *Exivi*—not to mention John's own approval of these two bulls; see G&F, 186–87.

[57] *App. minor*, 443–44.

[58] *App. minor*, 445: "Si enim apostoli, qui in dicta multitudine credentium, sicut nobilior portio ipsius multitudinis comprehendebantur, habuissent aliqua ipsorum speciali collegio appropriata, constat quod illa toti multitudini credentium communia non fuissent, quia quod est partis, totius non exsistit." Cf. *App. minor*, 431–32, and *App. mon.*, 751.

In the *Appellatio maior*, the problem of corporate poverty was dealt with at greater length. *Ad conditorem*, *Cum inter*, and *Quia quorundam*, in fact, all get the corporate poverty of the apostles and Franciscans wrong. The novelty Michael introduced in the longer appeal was to compare the need for any *religio* to ensure that no private person have or possess anything of his own to the need for "the whole *religio* of the Friars Minor" to have nothing of its own.[59] This religion, Michael continued, "quantum ad abdicationem proprietatis omnium rerum, quam in communi fecit censetur sicut una persona sive vice personae unius fungitur, Dig. 46.1.22."[60] Here Michael referred to a passage of the *Digest*, which stated that entities like municipalities and fellowships perform the function of a person.[61] In the *Appellatio monacensis*, he repeated the comparison between monk/monastery and college/general society, but in language similar to Francis.[62] That is, the *proportio* of a single individual to a college is the same as the *proportio* of a single specific college to a general community. There is more. Just as a single person is not perfect *personaliter* unless all individual temporal property is renounced, so similarly, or *proportionaliter*, a specific college cannot be perfect *collegialiter* unless it renounces all common temporal ownership and lordship.[63]

[59] *App. maior*, 272–73: "attendendum est quod quemadmodum essentiale est statui religionis cuiuslibet perfectae quod nulla persona privata aliquid proprium habeat sive possideat, ut in praellegato X 3.35.6, sic et religioni toti Fratrum Minorum essentiale est quod proprium non habeat." We might note in passing that Michael would probably not have found Innocent's comments to this part of the decretal particularly palatable. According to his *Comm.* ad X 3.35.6, nn. 1–2 (432vb), regarding the "abdicatio proprietatis … annexa regulae monachali," the "Papa potest dispensare cum monacho, quod habeat proprium vel coniugem, cum possit ordinem et naturam, quam dedit ordini, et substantiam tollere." The pope, however, needs to do so *ex causa*. Innocent proves that this has to be the case with an amusing hypothetical situation: Imagine that all of Christianity were in danger unless a monk became king (say because no one else knew how to govern the realm); surely in that case, he reasoned, the pope can dispense with the vow of personal poverty.

[60] *App. maior*, 273: "this religion, so far as concerns the abdication of the ownership of all things, which it does in common, is thought of as one person, or performs the function of one person."

[61] Dig. 46.1.22: "Mortuo reo promittendi et ante aditam hereditatem fideiussor accipi potest, quia hereditas personae vice fungitur, sicuti municipium et decuria et societas." See Michaud-Quantin, Universitas, 65–68, 119–21.

[62] See below, p. 275.

[63] *App. mon.*, 751: "Item, quae est proportio unius personae singularis ad unum collegium speciale eadem est proportio per omnia unius collegii specialis ad unam communitatem generalem. Sed persona aliqua singularis non potest esse perfecta personaliter nisi renuntiet in speciali proprietati omnium rerum temporalium, ut patet de primis credentibus Actuum 4 et de religiosis absque proprio vivere profitentibus. Ergo similiter, seu proprotionaliter,

From there it was easy to draw the connection to the situation of a a monk and monastery and the Franciscan Order and the whole Church.[64] Just as something given, granted, or offered to a monk passes into the lordship of the whole college (whatever the intention of the donor), and into the management of the abbot (even if the donor is thinking nothing about the college), so what is given to the college, or congregation, of the Friars Minor passes into the lordship of the Roman Church and management of the pope.[65] The similarity of this last statement to Bonagratia's tract needs no elaboration.[66]

So far Michael was attempting to show the corporate non-lordship of his Order. Part of his argument depended upon his adaptation of St Bonaventure's account of the fourfold *communitas* of temporal goods, which flow from a fourfold *ius*.[67] We have discussed them before, but now we must consider more carefully their corporate characteristics. Briefly, the first type of *communitas* was that which existed (only) in a time of necessity, and therefore can be omitted here. The second type of *communitas*, which is based on divine law, was the source for both the "primitiva communitas credentium" and those who followed the apostolic life in the Church, and it was to this type of community that the verses of Acts 4 and *Dilectissimis* referred.[68]

The third *communitas*, based as it is on humanly instituted law, describes the general civil order. But it can also describe corporations within civil society. Corporations of this sort, however, have nothing to do with evangelical society; in fact, those interested in evangelical perfection are obliged to renounce this sort of community. The reason for this is that, as it is often noted in Roman law, when a community—fellowship might be a better term in this context—is dissolved, the goods and monies of the community are divided amongst its members. In other words, he said, "what is a college's

collegium quodcumque speciale non potest esse perfectum collegialiter nisi renuntiet in communi proprietati et domino omnium rerum temporalium."

[64] As long, that is, that we remember the Franciscan double mode of renunciation is more extreme and therefore superior to the monastic model: *App. mon.*, 752.

[65] *App. maior*, 273: "quemadmodum illud quod datur, conceditur vel offertur monacho, qualiscumque sit dantis intentio, non in ipsius monachi transit dominium sed totius collegii, et subiacet dispositioni abbatis etiam si dans nihil de collegio cogitet, sic et quod datur, conceditur vel offertur collegio seu congregationi Fratrum Minorum in dominium Romanae transit Ecclesiae ipso iure et dispositionem summi pontificis, eidem Ecclesiae praesidentis."

[66] The idea was not new; cf. *Expositio Hugonis* 6 (146.29–147.12), and Bonaventure, *Epistola de tribus quaestionibus ad magistrum innominatum* 7 (BOO 8:333a).

[67] See Apppendix A.

[68] *App. maior*, 337–38.

is said to be the individuals'."[69] Michael's view was similar to the juristic view described above, namely that a corporation is nothing other than the men who are there: "Ideo cuilibet de tali communitate sive collegio dicitur competere proprium ius personale in rebus communibus illius collegii."[70]

The fourth type of *communitas* describes ecclesiastical society. Unlike Bonaventure, who used this fourth type to develop an explanation for why other mendicant orders or bishops—who have no personal, only "collegial" ownership—may still be considered perfect,[71] Michael focused on when this type of *communitas* arose, which, he said, happened after the Roman *principes* took up the Christian faith and richly endowed the Church.[72] The crucial difference between this community and the second one is that the ecclesiastical community is the one to which "datur actio et exceptio in iudicio" for the goods held by the community, which means it has *quasi proprietas* and *dominium utile*. The rationale here was that the type of control a church (or agent of the church) could exercise over these goods fell in between that found in the second and third types.[73] This was not a new idea: many canonists maintained, for instance, that a prelate could not alienate the goods of his church without the consent of the canons.[74] Michael in fact quoted Innocent IV and Hostiensis on this very point. The two canonists noted that it was Christ who had (full) lordship and possession of the things of the Church; they belong to the bishops, prelates, or chapters only as it concerns governance and administration.[75]

Michael utilized all these ideas in his argument against the Franciscan Order having a use of right. His response took several prongs. The first was an appeal to *Exiit*, which explained that the brothers could not acquire anything for themselves individually or for their Order even in common, and that the Roman Church received the ownership and lordship of the goods of which

[69] *App. maior*, 339, quoting *Glos. ord.* ad Dig. 47.22.1, s.v. "Competit"; he also cited Dig. 47.22.1.2 and Dig. 47.22.3 pr.

[70] *App. maior*, 339: "Therefore, an exclusive, personal right to the common things of the college is said to belong to each person of that community or college." See above, p. 260 n. 27.

[71] See the analysis in Lambertini, *Apologia e crescita*, 92–97. Michael also used it for this argument (*App. maior*, 346), but it was also crucial for his defence of corporate poverty.

[72] *App. maior*, 340; cf. *App. mon.*, 745–46.

[73] *App. maior*, 341; see p. 110, above, for the quotation.

[74] Innocent IV found that there were times when consent was unnecessary: *Comm.* ad X 1.3.21, n. 4 (19ra–b). For the general trend among the canonists, see Tierney, *Foundations*, 108–17.

[75] *App. maior*, 341, citing Innocent, *Comm.* ad X 2.12.4, n. 3 (222ra–b), and Hostiensis, *Comm.* ad X 2.12.3(4), nn. 3–4 (42va).

it was licit for the Order and brothers to have the use.[76] Whether or not one finds this response convincing, it clearly does not answer the problem posed by John: it could simply be argued that Nicholas spoke ambiguously here, for an Order simply cannot have a use of fact—and "licet habere" could easily be taken to mean something more than using a thing without any right whatsoever.

When Michael responded to the issue of an Order having *usus*, he made two different arguments. One was to equate the Order of the brothers with the *professio fratrum*. Thus, when *Exiit* said that the profession of the brothers abdicated the "ownership of use and the lordship of everything" it should be obvious that a use that is of right (according to the sense in Inst. 2.2.2) does not belong (*convenit*) to the Order or profession.[77]

Michael also addressed the supposedly imaginary nature of corporations. He wrote:

> Praeterea, adquirere aliquid alteri est iuris et in iure consistit, et tamen textus [*Exiit*] dicit quod fratres nihil possunt adquirere Ordini etiam in communi. Ergo liquet quod ea quae sunt facti, scilicet usus facti, congruit Ordini praedicto Fratrum Minorum, et ea quae sunt iuris non possunt sibi congruere. Et est ratio, quia Ordo, qui fungitur vice personae sicut haereditas, municipium et societas et curia, Dig. 46.1.22(!), abdicavit a se ea quae sunt iuris et retinuit solummodo ea quae tantummodo sunt facti.[78]

A little further on he repeated this point with further, if questionable, references to Roman law.[79] But he added that,

> imperite dictum est quod Ordo sit imaginaria persona. Nam illud de iure dicitur imaginarium quod similatur esse, et non est, Dig. 18.1.55. Et notatur

[76] *App. maior*, 377, citing *Exiit*, 2:1114.

[77] *App. maior*, 378; for *Exiit*, see 2:1113. Inst. 2.2.2 deals with *res incorporales*, the sort of things "quae in iure consistunt." Azo's glosses to this section consistently equate the *ius* of something to the thing itself; e.g., in the gloss to *ius hereditatis*, he wrote: "Idest hereditarium ius, quoad est hereditas: et sic de unoquoque." See Caprioli et al., *Glosse preaccursiane*, 95–97, here 96.

[78] *App. maior*, 377: "Moreover, 'to acquire something for someone else' is of right and consists of a right; and yet the text [*Exiit*] says that the brothers can acquire nothing for the Order, even in common. Therefore, it is proven that those things which are of fact, namely a use of fact, befits the Order of the Friars Minor; and that those things which are of right cannot befit it. And there is a reason: for an Order, which performs the function of a person (like an estate, a town, society, or curia, Dig. 46.1.22), abdicated from itself those things which are of right and retained only those which are merely of fact." On the reference to the *Digest*, see p. 269 n. 61, above.

[79] Inst. 3.17.1 (but cf. 3.17.3), and Dig. 41.1.34, which, as the editors note, "Non videtur esse ad rem."

> Dig. 50.17.16. Et quod imaginarium est, iuris vinculum non obtinet, Dig. 44.7.54, sicut nec chimaera.… Ideo quod imaginarium est, usum iuris habere non potest, quia iuris vinculum non obtinet. Ordo autem, sicut et collegium unum et populus unus et civitas una, interpretatione et statuto iuris in veritate repraesentat personam et fungitur vice personae. Unde nisi Ordo Fratrum Minorum abdicasset a se, ea quae sunt iuris sibi competerent.[80]

In the eyes of the law, the Order is a person; and what this means is that this "person" can renounce a use of right, just like a real person could do. On the other side, Michael also maintained, similar to Innocent, that an Order is little more than the people who comprise it. The phrase "brothers in common" is equivalent to "the Order"; thus "quod fratribus in communi relictum est, Ordini intelligitur esse relictum."[81] St Francis also clearly thought that this had to be true as well, for he was content with only forbidding the brothers to appropriate house, place, or anything. That is, he knew that *fratres*, in the plural, could indicate a college or community; and thus, when he forbade 'the brothers' to appropriate a place or domicile, he meant the Order could not appropriate.[82]

As for proof that a corporation might act "of fact," Michael quoted from Dig. 41.2.2: "Sed hoc iure utimur, ut et possidere et usucapere municipes possint idque eis per servum et per liberam personam adquiratur."[83] According to Michael, by using both *possidere* and *usucapere*, it was clear that both what is of fact and what is of law belong to a corporation, which performs

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[80] *App. maior*, 378–79: "it was unskilfully said that an Order is an imaginary person. For a thing is called 'imaginary' *de iure*, which we pretend exists but does not, Dig. 18.1.55; and it is noted in Dig. 50.17.16. And what is imaginary does not obtain the force of law: Dig. 44.7.54—just as is the case with the chimera.… What is imaginary, therefore, cannot have a use of right, for it does not obtain the force of law. An Order, however, like one college, one people, one city, in the understanding and determination of the law, represents in truth a person and performs the function of a person. Hence, if the Order of Friars Minor had not abdicated them, things which are of right would belong to it."

[81] *App. maior*, 372, citing Dig. 34.5.2(!) et 34.5.20(21): "what is left to the brothers in common is understood to be left to the Order." The same point is made at *App. maior*, 378.

[82] *App. mon.*, 676–78.

[83] Dig. 41.2.2: "But we use this law: that municipal citizens can possess and acquire ownership through possession; and it is acquired for them both through a slave and through a free person." A *municeps* was a citizen of a *municipium*, or free town, in antiquity. Michael seems to be designating the corporate nature inherent in the plural *municipes*, for which he had some grounds: cf. e.g., *Summa Paucapaleae* ad C. 17 q. 4 c. 10 (91): "Municipes sunt in eodem municipio nati ab officio dicti eo, quod publicis officiis mancipati sunt"; repeated almost *verbatim* by Rufinus, *Summa decretorum* ad C. 17 q. 4 c. 10, s.v. "municipes" (375). See further, Michaud-Quantin, Universitas, 119–21.

the function of a person.[84] Michael therefore defended Franciscan poverty by an appeal to the fiction theory. Where he differed from John was that he rejected the notion that an Order was an imaginary person. As a legal person it could act; in this case it could renounce a right of use.

Michael's appeals were published in the fall of 1328. He was the reprobate who provoked *Quia vir reprobus*, John's final pronouncement, just over a year later. In this longish bull (just under one-third the length of the *Appellatio maior*), the pope re-clarified his opinion regarding evangelical poverty for the last time. With respect to the problem of an Order having anything other that a use of right, John had little to add. Part of the emphasis this time around was in connecting the problem of an Order's supposed use of right with the idea that an act of using was something exclusive to an individual agent (and inherently incommunicable).[85] The other relevant passage in *Quia vir* made sure that everyone understood that the use of right that belongs to an Order is not an individual (*proprium*) right, but one common to the whole Order.[86]

Strangely, the *Appellatio monacensis* does not take up this issue again in the light of John's more forceful comments in *Quia vir*. Some arguments are repeated, as we have seen, but there are no new developments regarding the problem that the personality of an Order is but a legal fiction. At one point Michael spent some time showing that John was wrongly arguing for communal ownership among the apostles and early believers through a misunderstanding of the distinct sub-community of the apostles,[87] but the argument there relied upon rather than developed the existing corporation theory of the earlier appeals.

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[84] *App. maior*, 379: "In qua lege exemplum patet de utroque, scilicet de eo quod est facti ut possidere, et de eo quod est iuris, ut usu capere, quod haec universitati, quae vice fungitur personae, conveniunt."

[85] *QVR*, 559: "Item, quia usus facti sic est utentis quod non potest dici alterius nec communicabilis sibi. Patet enim quod actus comedendi sic erat sibi proprius quod non poterat dici aliis esse communis, quare et communio praedicta non potest intelligi quoad simplicem facti usum. Rursus, quia usus facti communitati non convenit, cum talis usus personam veram requirat et exigat, quam non gerit communitas, sed potius imaginariam seu etiam repraesentatam."

[86] *QVR*, 581.

[87] See *App. mon.*, 740–46.

## 5. *Francis of Marchia*

When Francis came to deal with this issue, he clearly relied upon Michael of Cesena's early appeals of 1328. However, he modified Michael's response somewhat and, in this case, this alteration led to the omission of a key element of the *Appellatio maior*.[88]

As he had done elsewhere, Francis began with a consideration of some of the possible meanings of the term under consideration. In one sense of the word, a *communitas* might well be imaginary and represented. This was true for a *communitas logica*, for this type of community is a "community of reason, abstracted from its particulars" (*communitas rationis abstracta a suis particularibus*). But this was surely not what John and the Michaelists were arguing over, which was a collective community—a "communitas rei uera et non rationis tantum." The example Francis provided is that of ten men pulling a ship together. It is clear, he explained,

> in tractu de facto nauis a decem hominibus simul, qui tractus facti nauis per se est communitatis seu multitudinis x. hominum ipsam trahencium et non alicuius persone singularis, quia nullus unus, per se solus, posset eam trahere de facto, et ita x. homines trahunt ipsam nauem simul ut unus motor seu tractor sufficiens et totalis.[89]

Thus, if use of fact required a 'true person,' it should be understood that this use of fact requires a true person or a community made up of true people. After all, there are many human acts where one 'true' person does not suffice, and a plurality is required instead. In the example of the actual (*de facto*) dragging of the ship, that actual dragging had to be attributed to the group, not any one individual. Finally, in Francis's opinion, it is absurd to say that use of fact requires a true person any more than a right of using does.[90] It was an argument that Ockham would expand upon.

This is not, however, to deny the reality of a corporation. Francis agreed with Michael that, "communitas specialis se habet ad communitatem generalem sicut se habet una persona singularis ad unam communitatem

[88] We must not forget though that Francis did deal with 'corporate' issues as it related to whether the college of apostles held any *dominium*. I have not repeated this here, but much of what is said above (p. 158 f.) applies here as well.

[89] *Improbatio* 161 (114): "the factual pulling of the ship is, *per se*, of the community and the group of ten men pulling it, and not of any one individual person: for no one person could factually pull it alone. And thus the ten men pull the ship together like one sufficient and whole mover or *tractor*." See also Miethke, *Ockhams Weg*, 505.

[90] *Improbatio* 156 (112).

specialem."[91] Francis employed this idea as an example of how it was possible for the college of the apostles to renounce corporate ownership,[92] even going so far as to argue that the community of apostles "held the place of one specific person" as it concerns the abdication of ownership,[93] or right.[94]

Francis thus answered the pope's objection, but only by recasting the question. He did not discuss the question of whether an *ordo* should only be considered a juridical "person," which was, after all, the focus of John's claim. This is even more apparent where he responded to the pope's point that the use of right that belongs to an Order had to be a *ius commune*. To be fair, one of Francis's primary goals in the *Improbatio* was to prove that whenever John said "use of right" or "right of using," he had to mean a right that was *litigiosum et contenciosum*, which included a *ius agendi*, or a right to take action in court. Thus, he reasoned, John had to mean, in some way, an exclusive (*proprium*) right of using, for no one can start a legal suit on behalf of a right of using that is only common and in no way exclusive *except where* someone wishes to appropriate for himself the common right (*ius commune*).[95] This is a far cry from the position defended by Innocent.

In summary, then, while Francis insisted that a corporation was a 'real' thing in contrast to a 'logical' entity, it was only as real as the people who comprised it. This is not what John was saying, who was concerned only with a corporation as a legal entity; nor does it seem to match up properly with Innocent's understanding, which, though he would agree with Francis on this point, also viewed a corporation as the locus of a set of rights, which inhered in it—even if that meant inhering, ultimately, in the members. The difference between the two positions had a lot to do with what 'direction' one viewed the corporation from. Francis was concerned with the agency of the individuals looking 'out' through the corporation: no single Franciscan would want to take up any 'collegial' right, even to act on behalf of the college. John, on the other hand, was thinking from the perspective of one granting a thing, 'use' in this case, to the college; he was looking 'in,' through the corporation, to the people who comprised it. Thus, the use, conceded as a

[91] *Improbatio* 743 (335): "a specific community is related to a general community just like one specific person is related to one specific community."

[92] See *Improbatio* 50–52 (70–72) and 1164 (473–74).

[93] *Improbatio* 283 (163).

[94] *Improbatio* 733 (332).

[95] *Improbatio* 730 (331–32): "Ex quo etiam sequitur quod ipse intellexit de iure agendi proprio alico modo, particulariter uel collegialiter, quia pro iure utendi tantum communi et nullo modo proprio, nullus mouet causam aliquam in iudicio, nisi in casu cum quis ius commune uult sibi appropriare."

right of use, was conceded to the Order—that is, in common to the people who comprised it.

## 6. *William of Ockham*

Although corporations or corporative thinking, as it were, would eventually play a very important role in Ockham's *opera politica*, the poverty controversy provided the first forum to develop his thoughts on their nature.[96] Yet this aspect of his defense of Franciscan poverty remains mostly unstudied, or, where scholars have addressed Ockham's thoughts on corporations, insufficient attention has been paid to the *Opus nonaginta dierum*, and Ockham's relationship with his fellow dissidents.[97]

Let us start, however, with his *Epistola ad Fratres Minores*, written shortly after the appearance of the *Opus nonaginta dierum*, for it lays the issues out clearly and succinctly. According to the letter, errors abound in John's various bulls; of the many found in *Quia quorundam*, Ockham saw fit to mention seven. Three of them relate to our topic: that the Order is an "imaginary and represented person"; that things of fact cannot belong to an Order; and that things of right can belong to an Order.[98] These three errors, he wrote, are too ridiculous to require anything but derision.[99] Ockham would return to this point in other works as well, but it was usually little more than a summary of the three errors.[100] Only the *Opus nonaginta dierum* and the *Contra Benedictum* present a detailed refutation of the pope's position.

When he discussed these three errors in the context of the poverty controversy, he included a fourth, related, error: that the Franciscan Order had a

[96] Lagarde, *Ockham: Critique*, 43–44, provided a brief account of Ockham's use of corporate terminology, but it is in dire need of revision. He wrote, for instance that Ockham used the word *uniuersitas* "assez rarement," but the term is used quite frequently in the *Dialogus*. A quick search through the third part of the *Dialogus* reveals it being used several times in the sense of *uniuersitas fidelium* or *mortalium*, as well in the sense of 'corporation' or 'community'; see Robinson, "Ockham's Early Theory of Property," 225 n. 98, for references. A particularly interesting application of his corporative thinking occurs at 3.2 *Dial.* 1.29 (246va–rb).

[97] Coleman, "Ockham's Right Reason," and Hamilton-Bleakley, "Some Additional Thoughts," are two recent examples.

[98] *Epist.*, 3:9.29–10.3; at *OQ* 8.7.49–55 (1:206), it is suggested that "ad minus sunt circiter nonaginta" errors in his bulls. See the recent discussion in Levering, "Ockham on the Papacy," 751–58.

[99] *OND* 6.413–414 (1:365). Cf. Miethke, *Ockhams Weg*, 507–08, who, in the following pages, attempted to relate this position to Ockham's philosophical views.

[100] *CB* 1.8 (3:189.26–191.39); *CE* 3.56–74 (4:30–31); *CI* 24 (3:102.27–103.12); *IPP* 27.257–294 (4:335–36); and *OQ* 8.7.112–125 (1:208).

right of use to the things it used. Ockham made it clear that he understood the Roman law meaning lurking in the term. As he said, every use of right is a *usus nudus*, or a usufruct.[101] The Order, of course, does not have this kind of use, for Clement had forbidden the Order to litigate in *Exivi*, and a use of right was a use that one could defend in court. Thus, one could be sure the Order did not have a use of this sort.[102]

Ockham dealt with the other errors in turn. He also doubted in the strongest of terms that a "community behaves like an imaginary or represented person" (*communitas gerit personam imaginariam seu repraesentatam*). Like Francis, he argued this made no sense, not to mention contradict other *dicta* of the pope.

> Quia illud, quod potest habere actum realem, non est persona imaginaria et repraesentata. Sed ecclesia est quaedam communitas, quae multos potest actus reales exercere; habet enim ecclesia iurisdictionem magnam, per quam potest iudicare inter litigantes, res ecclesiae defensare et multa alia facere, quae personae imaginariae et repraesentatae convenire non possunt.[103]

Similarly, John had also insisted that the Order of Friars Minor has a right of using in the things they used, which would be impossible if the Order were an imaginary and represented person. Therefore, he concluded, the pope did not really think that the Order (or any other community) was really imaginary.[104]

Ockham addressed the issue of representation in his account of who owned the goods that the apostles used. There were three possibilities. In all cases the goods were common to the general community of believers, but in the second case, which clearly owes much to Francis's position, Ockham suggested that there may be a common sort of lordship by which someone could litigate in the name of the whole community. In this case, the apostles would not have more than simple use of fact, either individually or in respect of their specific college—though not because they lacked a right common to their college and to the others.[105]

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[101] See p. 210, above.

[102] *OND* 62.200–201 (2:568).

[103] *OND* 6.424–429 (1:365): "That which can have a real act is not imaginary and represented. But the Church is sort of community that can exercise many real acts. For the Church has great jurisdiction through which it can judge between litigants, defend the Church's goods, and do many other things—which cannot be appropriate for an imaginary and represented person."

[104] *OND* 6.433–438 (1:366).

[105] *OND* 106.84–90 (2:772): "Alii dicunt quod illa bona erant communia Apostolis et aliis

The apostles, William argued, had use of fact of consumables separate from both individual lordship and a "common" lordship proper to the college of apostles, for the consumables were common to the entire community of believers.[106] The upshot of this point is that Ockham was forced to admit that it was possible that the apostles did not have use of fact separate from every human-based (*humanitus inventum*) lordship.[107] But the argument is enough for Ockham's modified Michaelist position, which drew three conclusions from the fact that the apostles held neither individual lordship nor some sort of exclusive common apostolic lordship: First, that the apostles had use of fact of consumables separate from (individual and common) "full and free" or "civil and worldly" lordship; second, that they had this use separate from all individual lordship (of any type); and, third, that this use was separate from any lordship common to the college of apostles.[108]

Ockham belaboured this point because what was theoretically possible for the *collegium apostolorum* distinct from the rest of the early Church can also be true for the Franciscans as a distinct group within the Church. Thus we read, for instance, that

> nec est intentio appellantis nec ipsorum [i.e., *impugnatores*] in suis traditionibus indagare, an Apostoli habuerint in temporalibus aliquod ius utendi, immo etiam dominium aliquale et proprietatem communem collegio suo speciali et toti residuo communitatis fidelium vel illorum, qui bona communia ecclesiae dispensanda receperunt; sed intentio eorum est quod Apostoli in rebus temporalibus non habuerunt dominium vel proprietatem nec aliquod ius utendi, etiam communiter accepto iure utendi pro iure, quod actionem dat civilem, proprium collegio Apostolorum.[109]

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quoad aliquale dominium, quo quis nomine totius communitatis poterat habere potestatem pro eis in iudicio litigandi. Et tunc Apostoli habebant simplicem facti usum in huiusmodi rebus propter carentiam omnis iuris in eis, quod esset proprium cuicunque Apostolo vel toti collegio Apostolorum, non propter carentiam omnis iuris communis eorum collegio speciali et aliis."

[106] *OND* 6.86–123 (1:357–58). The point of this argument was to solidify the claim that consumables were common to (all) the first believers with respect to a power of relieving their needs.

[107] It was an open question in Ockham's opinion whether what was common to the whole community of believers could be called some unique type of lordship; see the discussion on p. 170, above.

[108] *OND* 6.124–138 (1:358). One might compare Olivi's claim in *QPE* 8, 178–79.

[109] *OND* 6.468–476 (1:366–67): "it is neither their nor the appellant's intention to investigate in their accounts whether the apostles had some right of using in temporal things, or rather even some kind of lordship and common ownership in their own particular college and the whole remaining part of the community of the faithful, or of those who received the common goods of the Church that were to be dispensed. But it is their intention that the

Ockham therefore conceded that it was possible that the apostles *and* the whole community might have had a right in the consumables. But that was not an issue the Michaelists cared to answer. They were only concerned with the corporate rights of the apostles *qua* a corporation, and in that case they did not have any property rights in common. Ockham was not entirely sure that the apostles individually or as a group shared this *ius commune*. It was possible that they did, but it might actually have been only some part of the community of all the faithful that did.[110] Individually, of course, the apostles had only the God-given licit power of using consumables, regardless of who owned them.[111]

Ockham also used Francis's argument regarding the pulling of a ship. Some acts, it is true, require a unique individual, but others clearly require the collective efforts of several people.[112] A community, in short, is not one true person, but several true people; and an Order is not a "unica vera persona," but is true people, just as a people is not one man, but is many men.[113] A word like "people" or "army" is a collective name (*nomen collectivum*): they imply and require plurality by their very nature.[114] But a people is many men gathered *in unum*, just like a community of the faithful is many faithful people professing one faith. A community "non est aliquid fantasticum nec imaginarium, sed est verae personae, sicut grex porcorum non est aliquid fantasticum, nec civitas est aliquid fantasticum aut fictum, sed est verae res plures, non unica."[115] Therefore, as Miethke noted, when Nicholas III said that the Order had this use, this simply meant that the friars had this use,

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apostles did not have lordship or ownership, nor any right of using, to those things—even the right of using commonly taken for the right that gives a civil action—exclusive to the college of the apostles."

[110] *OND* 6.485–495 (1:367). Although Ockham never said which alternative he favoured—for either claim was sufficient for his stated purpose—it is likely he preferred the latter inasmuch as he added that it would mean that the apostles *qua* a corporation only had a licit power of using the things bought with the common pool of money.

[111] See above, p. 221.

[112] *OND* 6.440–446 (1:366); cf. 62.279–280 (2:570).

[113] *OND* 62.281–283 (2:570): "Verum est quod ordo non est unica vera persona, sed est verae personae: sicut populus non est unus homo, sed est plures homines." See also Quillet, "Community," 537, for other references. But cf. Ockham's comments about the common lordship of a solitary monk in a monastery on p. 163, above.

[114] *Sent.* 1.30.2 (OTh 4:334.10–20). Cf. *Sent.* 1.30.3 (OTh 4:355.18–26), and *Quodl.* 6.15.67–74 (OTh 9:638–39). In fact, John made a similar point about the word *communio*; see p. 45 n. 83, above.

[115] *OND* 6.446–455 (1:366): "A community is not some fantastic or imaginary thing, but is a true person; and the same goes for a herd of swine, or a city, which is not singular, but is several true things." Cf. 3.1 *Dial.* 2.1.54–61 (8:162).

for the brothers are the Order.[116] This argument was similar to—but more pointed than—Michael's claim in the *Appellatio maior*; it was, in fact, even closer in spirit both to the gloss "Non debetur" and to comments Ockham had made in his academic writings.[117]

Elsewhere Ockham made an argument reminiscent of Francis's description of a *logica communitas*. If, he said, the Franciscan Order were only an imaginary and represented person, the same must be said of the Church. He thought that the absurdity of this position was clear:

> Quod enim est tantum repraesentatum et imaginarium est fantasticum, et non est in re extra animam. Sed ecclesia non est quid fantasticum non existens extra animam.… Quia aut [1] ecclesia est extra animam, aut [2] in anima tantum aut [3] aliquid compositum ex ente in anima et ente extra animam. Si est in anima tantum, vel aliquid compositum ex ente in anima et ente extra animam, ergo nullum reale nec iurisdictionem realem potest habere: quae dicere de ecclesia est impium et blashphemum. Si autem ecclesia est extra animam, vel ergo [a] est una res, vel [b] plures; et sive sit una sive plures, non est persona repraesentata et imaginaria; quia nec una res est persona imaginaria, nec plures res sunt una persona repraesentata et imaginaria.[118]

As to whether things of fact can belong to an Order, if this were impossible, then one would have to conclude that they could not be appropriate for any community or college: neither the Church, nor a general council, nor the congregation of the faithful, nor a people, nor a crowd, nor a folk, nor a city, kingdom, nor any sort of corporation or community. Yet many examples from Scripture and canon law bear out the opposite.[119]

The third error was that although things of fact could not, apparently, belong to an Order, things of right could. According to Ockham,

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[116] Miethke, *Ockhams Weg*, 510.

[117] See p. 273 n. 81 and p. 260 n. 27, above. See Miethke, *Ockhams Weg*, 511–13, for references to Ockham's philosophical writings.

[118] *OND* 62.211–220 (2:568): "For what is merely represented and imaginary is a fantasy and does not exist outside the mind in reality. But the Church is not a fantasy, not existing outside of the mind.… For, either the Church is extra-mental, merely intra-mental, or something composed from an intra- and extra-mental entity. If it is merely in the mind, or composed from an intra- and extra-mental entity, then it cannot have a real thing or real jurisdiction—which is impious and blasphemous to say of the Church. If the Church is outside the mind, however, then it is either one thing or many; and whether it be one or many, it is not a represented and imaginary person: for neither is one thing an imaginary person, nor are many things one represented and imaginary person" Cf. 62.283–287 (2:570). See also Baudry, "L'Ordre franciscain," 188–90.

[119] *OND* 62.227–256 (2:568–69); cf. 6.415–420 (1:365). *CB* 1.8 (3:190.17–24), provides an even longer list of scriptural references, but drops those to canon law.

> Quia omne ius ad actum aliquem ordinatur; cui ergo illud, quod facti est, convenire non potest, nec illud, quod iuris est, eidem poterit convenire. Item, nulli, quod est solum imaginarium, potest ius aliquod convenire. Sed ordo secundum istum est solummodo quid imaginarium; ergo ei non potest ius convenire.[120]

In *Contra Benedictum* he expanded slightly on his argument.

> Dicere autem, sicut iste dicit, quod persona imaginaria et repraesentata potest habere illa quae iuris sunt, et non actum realem, est tam fantastice dictum, ut in fantasticis assueti hoc nequaquam capere possint, cum communiter fantastici teneant quod illa, quae in anima sola imaginatione exsistunt, iura realia habere non possunt.[121]

John's argument also fails, he explained, because if a real action is incompatible with something by its very nature, the same must be true for the right of exercising that real action. Although he has switched from pairing *usus facti* / *usus iuris* to *actus realis* / *ius exercendi actum realem*, so far the argument is pretty much the same. The crucial addition is that corporate bodies can have *iura et actus reales*; he goes on to list several 'real' acts, such as the act of judging, correcting, dispensing the sacraments, or managing ecclesiastical things. An Order is, after all, *verae personae et reales* in the same way that the Church, or congregation of the faithful is true and real persons, for it is true persons that make up the mystical body of Christ.[122]

Ockham wrote the *Contra Benedictum* around 1337/38, some five or six years after the *Opus nonaginta dierum*,[123] which may explain why he was suddenly willing to stress the fact that an Order can—the verb *posse* is important here—have rights. It fits well with his general argument, to be

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[120] *OND* 62.259–263 (2:569): "every right is ordered to some action; therefore, what is of right cannot belong to a thing to which what is of fact cannot belong. Likewise, no right can belong to what is only imaginary. But an Order is, according to him, only something imaginary; therefore, a right cannot belong to it." Cf. 62.287–289, 570. See Miethke, *Ockhams Weg*, 510.

[121] *CB* 1.8 (3:190.29–34): "To say, as [John] does, that an imaginary and represented person can have things of right and not a real action is so fantastically said that those accustomed to fantasies can in no way grasp this; for fantasists generally maintain that what exists only in the mind through a mental image cannot have real rights."

[122] *CB* 1.8 (3:191.4–14): "Ordo igitur potest habere iura et actus reales: quemadmodum ecclesia tam universalis quam particularis potest habere et habet non solum iura sed etiam multos actus reales, scilicet actum iudicandi, corrigendi, sacramenta ecclesiastica dispensandi et de rebus ecclesiasticis disponendi, ac innumeros alios.… Nec ordo est persona imaginaria et repraesentata, sed est verae personae et reales, licet non sit una persona: quemadmodum ecclesia sive congregatio fidelium, licet non sit unica persona, est plures verae personae et reales, quia est corpus Christi misticum, quod est verae personae.…"

[123] Baudry, *Guillaume d'Occam*, 189.

sure, but this was very close to the view John had been defending, namely, that an Order had to have rights since that is all an Order *can* have. It is therefore somewhat surprising that Ockham would choose to stress this point, regardless of the context in which he wrote it.

By way of conclusion, we should say that, of all the opinions we have considered on the nature of corporations, those expressed in the *Appellatio maior* seem to make the most sense in light of Innocent's own views. Innocent's opinion seems ambiguous though. If one were to judge solely by his *Commentary*, one would be hard-pressed to find a reason for why he would agree to Michael's account of how a corporation may be granted anything other than rights—rights, which, in the end, devolved to the actual members of the corporation in common. The increased powers he granted to the nominated agents of the Order in *Quanto studiosius* would seem to bear this out as well. And although we have seen how Innocent did not discuss *usus* per se, his familiarity with Roman law makes it seem likely that he would understand a grant of *usus* to an Order to be one of right, not of fact.[124]

Concerning the 'represented' nature of an Order, Innocent, John, Bonagratia, and Michael seem to be in agreement to a certain extent; Francis and Ockham missed the point. But I suspect that they were more concerned with the philosophical tradition of *repraesentatio* and especially John's use of the term "imaginary," which John perhaps had little justification to employ.[125] The Michaelists were usually keen to jump upon any chance to impugn John's arguments, and they clearly saw an opportunity here. From their arguments, we should assume that Francis, and Ockham following him at first, chose to interpret the pope to mean that an Order was *only* a represented and imaginary person. And in both cases they gave arguments to show that this could not be true. An Order was like the Church, made up of real people. But as we have seen, no one denied this.[126] As J. P. Canning has shown, for

[124] One of many other issues where further study may prove fruitful would be to examine more closely Innocent's writings regarding the need for a corporation to receive legitimate sanction (*tacitum vel expressum*) from a superior, particularly as a cornerstone of defenses of Franciscan poverty is that their Order and their brand of poverty possesses (repeated) papal approval. On Innocent's views, see *Comm.* ad X 1.31.3, n. 1 (148ra) and ad X 5.21.14, n. 2 (526rb). See also the comments in Melloni, "Ockham's Critique," 189–90.

[125] The same could be said of modern interpreters of Ockham, who skip quickly over 'imaginary' in order to link 'represented' with his academic writings; see, e.g., Quillet, "Community," 561–65. Cf., with caution, Kinsella, "Poverty of Christ," 505.

[126] It thus may be true that Ockham's "logical individualism" (McGrade, "Birth of Individual Rights," 163; cf. Shogimen, *Ockham and Political Discourse*, 170, 191, and 216), suited this position, or his "nominalist philosophical conclusions" (Morrall, "Ockham and Ecclesiology,"

Baldus (d. 1400) a "*populus* is *at the same time* both an abstract entity and real men," that they are two aspects of the same thing, but he "never maintains that the *populus* as a conceptualization performs these legislative and governmental functions."[127] *Mutatis mutandis*, the same, I think, could be said of Innocent or the Michaelists.[128]

It would also seem that Michael's response was the most successful rebuttal of John's position in terms of answering what the pope was actually saying in an imprecise way. Michael utilized the distinction between the types of law—divine, natural, and positive—in a way that his confreres did not: he made explicit that the Order, considered as such, renounced positive law-based rights. Ockham was one step closer to this position in the *Contra Benedictum*, where he wrote that, despite what "that fantasist, John, dreams up," "the Order of the Friars Minor is true people, who have and can have real rights and acts."[129] What he forgot to mention, though, was that though it *can* have these kind of rights, it does not *need* to have them. As Michael said, *had not* the Order renounced these rights, it would have had them.

485), but I doubt we need to chalk it up to being more than a standard view, or commonsense. Moreover, it is clear that Ockham did lend a sense of personality to the "Church"—no less, that is, than Innocent did.

[127] Canning, "Corporation," 14 (emphasis Canning's).

[128] Cf. Tierney, "Natural Law and Canon Law," 7.

[129] *CB* 1.8 (3:191.36–39), citing C. 24 q. 1 c. 20: "Quare ordo fratrum Minorum non est persona imaginaria et repraesentata, sicut et fingit iste fantasticus Ioahannes XXII; sed est verae personae, quae iura realia et actus reales habent et possunt habere."

CHAPTER EIGHT

# CONCLUSIONS

We are now in a position to make some conclusions and generalizations about Ockham's theory of property rights as it was expressed in the *Opus nonaginta dierum*. I would like to do two things in this final chapter: summarize the essential similarities and differences of the Michaelist position on the nature of Franciscan poverty, and, secondly, consider briefly the extent to which he 'went beyond' the Michaelist framework when it came to his use of canon and civil law.

## 1. *Summary of the Michaelist Position*

The first task is easy enough. A careful reading of these notoriously dull texts shows that within the framework of broad agreement, there was still room to work out individual positions.[1] The Michaelists to a man adhered to what Kenneth Pennington recently described as the "hierarchy of laws,"[2] although the *ius gentium* played a rather unimportant role in their descriptions of the interaction between various types of *iura* and *leges*. Taken broadly, the Michaelists seem fairly close to what the Decretists wrote in their commentaries to Gratian's *Tractatus de legibus*, although there is no direct quoting from even the more influential of them. The Michaelists cared most about the division between human and suprahuman law. Ockham also developed further the hazy distinction between positive and non-positive types of law, which relied on his reading of both *Exiit* and the relevant passages of the *Decretum*. It also seems to be generally true that the Michaelists employed *lex* and *ius* when they were trying to mark a distinction between positive and non-positive law; however, it cannot be said that they exclusively meant that *lex* was always positive law, while *ius* was not. Ockham's use of *ius fori* and *ius poli*, for example, flies in the face of this distinction.[3] Perhaps it is best to

[1] Lambertini, "*Usus* and *usura*," 209.

[2] Pennington, "*Lex naturalis*," 574.

[3] According to Miethke, "*Dominium*, *ius* und *lex*," 254, Ockham never again used this terminology.

say that the distinction is more apparent in Bonagratia's and Michael's texts than in Francis's and Ockham's.

There are two keys to Michaelist thinking about *ius*. The first picks up on the standard idea that *ius naturale* is unchanging. As we have seen, everyone affirmed its general immutability, just as everyone confirmed that this immutability could be altered in part given the correct set of circumstances. The Michaelists tended to argue for this idea on the basis of the common-sense maxim that necessity is subject to no law. Although it was not a Franciscan invention to claim that in times of extreme need, people had a *ius* to take what they needed for their survival, it was something that they were fond of repeating.[4] From here it was a short walk to the idea that *ius naturale* was irrenounceable, which itself implied that other *iura* were not. This became the basis for the idea that Franciscans and their order could operate 'extra juridically,' that is, outside the bounds of positive law yet still within the sphere of natural law. As McGrade once put it, they sought a "disengagement from the legal order,"[5] that is, from the humanly legislated legal order.

The other key feature of *ius* for the Michaelists was that the holder of a *ius* could always legitimately and automatically take action in court if his *ius* was infringed. This point was one of the insuperable rifts between John and the Michaelists. Yet it is interesting that the pope's denial that a *ius utendi* automatically entailed a *ius agendi* means that he was actually not that far from the Michaelists' point that their rightless use through licences of using was significant because it was legally indefensible. This, to me, seems like one of the best ways for reconciling—should one want to—the pope's basic position on Franciscan poverty with some of the aims of the Michaelists, or indeed with Nicholas III's *Exiit*.

There are also some differences to be noted among the major Michaelist tracts on the nature of *ius*.[6] For Michael, the key point about *ius* was how it was responsible for founding the different *communitates temporalium*, which neither Francis nor William were much interested in. Francis's main points about *ius* was that the pope's exclusive focus on positive law *ius* was too narrow to be of any real use, and in fact misrepresented the nature of the problem entirely. Ockham's real novelty was his elaboration of the

[4] So much so that Lee, "Roman Law and Human Liberty," 29–30, misunderstood Ockham on this point, which he also treated as if it were the sum of Ockham's position.

[5] McGrade, *Political Thought*, 16.

[6] I exclude Bonagratia's shorter ones, mostly because they are too short for any detailed comparison.

Augustinian distinction between *ius fori* and *ius poli*, which he grafted onto the standard conception of the hiearchy of laws; he recognized that it was important to distinguish between positive and non-positive (or moral) law. And, as will become apparent in the next section, he also made independent use of canon law to draw this distinction. The advantage of Ockham's position is that it is a useful basis for explaining all kinds of lordship or lordship-like relationships. Thus Franciscan use, which is rightless, is a power-relationship between the rightless friar and the rights-holding owner, who, in theory, sets *all* terms of the friar's use. This is similar to other types of proprietary relationships, although in other cases the beneficiary of, say, a usufruct or right of using has certain legally protected rights. The model also works, *mutatis mutandis*, for a king's or emperor's *dominium* over the goods of his subjects, or even God's over creation. It must be noted, however, that the other Michaelists held, either expliticly or tacitly, a similar view; yet Ockham put forward the ideas in a more comprehensive fashion, and which clearly serve as the basis for his more mature views on *dominium* in both proprietary and political lordship senses.[7]

*Dominium* remained a clear concept for the Michaelists. As some recent work has shown, medieval authors sometimes had trouble deciding whether, or perhaps to what degree, one could equate *dominium* and *ius*.[8] It sometimes seems to me that authors, both medieval and modern, can become confused whether this equivalence was meant more metaphorically than anything else, but for the Michaelists, the picture seems clear. *Dominium* belongs under the 'genus' of *ius*, especially insofar as it was used in the context of evangelical poverty. If one had *dominium*, one certainly had a *ius*, but if one had a *ius*, one might still not have *dominium*. The main point the Michaelists were concerned to make was that *human* lordship, the only one that was ever really at issue, was not part of the prelapsarian condition of man, and was not entirely necessary now. (The *dominium* found in the state of innocence was of a different, non-coercive sort; it had nothing to do with proprietary lordship.) After the fall, ownership became a "free possibility," but as useful as private ownership might be for human society, it was "never allowed to interfere with the fundamental right of living."[9] Thanks to the example of Christ and the apostles, we know that it is possible for some to live without any lordship over temporal things, and that it is most

[7] Cf., e.g., *Brev.* 3.7–11 (4:178–84).

[8] In addition to Brett, *Liberty, Right and Nature* and Tierney, *Idea of Natural Rights*, see now Varkemaa, *Conrad Summenhart's Theory*.

[9] Miethke, "Concept of Liberty," 95.

meritorious to do so by a vow, which also means that—as long as a religious remains true to his vow (admittedly not as easy as the Michaelists made it sound)—such a person is 'intentionally' incapable of acquiring property rights. And as people who have renounced authority over their own wills, effectively making them *iuris alieni*, they are legally incapable of acquiring the same rights under positive civil law.

In the course of trying to prove that property rights were not necessary, the Michaelists explored the nature of *dominium et proprietas* quite extensively. If we consider the list of incidents Honoré suggested,[10] it should be clear that the Michaelists did not discuss every point on the list. In general, they preferred to provide lists of gerunds of varying lengths, which described the various things owners can do with their things (e.g., selling, alienating, giving). Even so, it would seem that Ockham and his confreres account of "full and free lordship" shares much with the modern "liberal concept of full individual ownership."

Regarding (1), this was very much the basic right (exclusive) *dominium* afforded: control over the owned good, free from outside interference in normal circumstances. (2) plays no less important a role: owners have the right to use their own things, or (3) may grant some other party (individual or corporate) the right or licence to use it. If a right is granted, the beneficiary thereby acquires certain defensible rights; but the owner may choose to give 'less,' as the example of poor guests invited to dinner shows. Unlike a usufructuary, who can even sell, grant, or rent his right to a third party, a licence to use does not even include the power of carrying away the food from the dinner table (unless that is part of the licence). Holders of the variously types of 'uses of right' also have the right to derive income from the thing (4); although this point is not made in reference to owners, it is surely implied. The right to the capital (5) was discussed at length. Most of the lists of gerunds described forms of alienation, and the right to (ab-)use was certainly not ignored. Except as a further specification of (1), the immunity of expropriation represented by (6) was not discussed in any real detail. Michael wrote that an owner should not be deprived of his goods or his power of treating them as he would without cause, and Ockham generalized this to be a point about one's *ius*, but they did not elaborate. Inheritance (7) was not brought up in the poverty controversy, presumably for the simple reason that religious should not have any heirs. Ockham's discussion of how lordship should only transfer from *proprium* to *commune* by means of some

[10] See p. 26f.

explicit action does, however, touch on this issue. (8) should probably be assumed to be a feature of the Michaelist theory of property, but the question was never raised. (9) was also not discussed beyond, perhaps, the hints that one could lose his things or rights for fault or reasonable cause. (These two reasons could be quite flexible.) Again, the problem may well have been that the polemics all assumed that the friars would not be using things in a way that would cause harm. The same holds for (10): in the realm of theory, the Franciscans individually and as an order were in no danger of insolvency. Finally, (11) was also largely missing from the texts. The closest we get is Michael's explanation that if a corporation is dissolved, its goods are to be divided amongst the members of that body. This hardly covers the range of topics that (11) clearly requires.

The Michaelists also insisted that the kind of proprietary lordship exercised by churchmen in their official capacity was not the same as the type of lordship people exercised as regular citizens. Ecclesiastical lordship was restricted in its scope, and clerics should be thought of as stewards and administrators of this property, not full-fledged proprietors, for they manifestly cannot, as Ockham would say, dispose of a *res ecclesiae* by selling, giving, bequeathing, donating or alienating it at their own pleasure;[11] nor do they have the ability to sue for it in court in their own name and treat it in any way not prohibited by natural law.[12] Although the *dominium* is less complex in the sense that it comprises fewer powers than civil lordship, it is more complex in the sense that one must always keep the distinction of office and person in mind.

The Michaelists showed perhaps the most variation when it came to *usus*. They were all agreed that *usus*, even in the context of property rights, did not only mean "legal" use, or that the description of *usus* in the *Institutes* (2.4) and *Digest* (7.1) was the only relevant meaning of the term. To have *usus* does not necessarily mean one has a right to use.

So far the Michaelists were in harmony with each other, but they made their point in different ways. Michael attacked the pope's account of *usus*, which he recognized as a gloss of Azo's, by pointing out that even Azo admitted that there could be a "de facto" use. That is, *usus* might refer to the legal right or the physical action. He then described these rights of using as being either divine, natural, or civil, which clearly correspond to the various types of *ius*. For Michael, the question of Franciscan poverty was concerned

[11] *OND* 4.568–571 (1:343), describing *proprietas*.

[12] *OND* 2.389–397 (1:308), describing *dominium*. It is the second characteristic that is most important.

with a *usus iuris ciuilis*, which perhaps explains why Michael never really articulated a theory of natural rights. Michael's arguments on this topic were made with copious references to both canon and civil law.

An important part of the Michaelist response to John was their theory of licences. Friars had licences, not rights, to use things, and the easiest way to tell them apart was that this sort of licence gave no one a *ius agendi*, while a *ius utendi* certainly did. For Michael, human beings also have a *licentia utendi* the things they need for survival in times of extreme necessity. Both Francis and William provided a somewhat different account of what mechanisms come into play in times of necessity, though the net result remained the same: one may take the steps needed in order to survive past that moment of extreme need.

Michael's explanation of how one could use things outside of extreme necessity without possessing any rights to use them relied on the idea that human beings have in the first place a simple ability (*facultas*) to use things. However, for the use to be considered licit, it must be permitted in some way. Some things belong to the ecclesiastical community in general, which are common by divine law, but this does not typically include the basic items of daily life, such as food or clothing (or books). To use these things, one needs a licence if not real property rights. This is what temporal owners give the friars: a positive law-based licence to use, which we know is not a right because the licence-holder has no way to defend his licence in court against the one who granted it.

Francis of Marchia broke down *usus* in a different way. The two features of his account that stand out the most are that every type of *usus* consists of the physical act along with some abstract "principium" of that act. Thus *usus facti* consists of both the act and the faculty of using, just as usufruct consists of both the right to receive the fruits and the act of receiving those fruits.

The other noteworthy feature concerns the *ius utendi*: according to Francis, there is a temporal and a spiritual *ius utendi*. A temporal right of using covers those situations that occur within the sphere of positive law, where the actors have positive rights to property, such as usufruct or the *ius utendi* referred to by the pope. The spiritual right of using is not really a 'right' at all, but it is what makes our innate *facultas utendi* licit and just, either through our *facultas naturae*, or, more commonly, through the receipt of a revocable and legally indefensible *licentia simplex* from someone who holds legitimate rights over the thing that will be used or consumed. Francis maintained that

every legitimate act of using, however construed, involves some form of a *ius utendi*; the pope's *ius utendi* is only part of the picture.

Ockham's account of *usus* shows a number of similarities to and echoes of the other Michaelist texts, but he assimilated Michael's 'legal' arguments to Francis's more philosophical ones, as well as provided a greater degree of precision to the views of both. Like Francis, he made a big deal of the pope's merely juridical interpretation of the meaning of *usus*.

Ockham is also easier to follow than Francis is with his *ius utendi spiritualiter*,even if the point they wanted to make was the same. On the contentious issue of how a use 'of fact' might be licit or 'just' without the actor having any rights to do so, Ockham's position was that one needed either a natural right of using, which manifested only in particular situations such as extreme need, or a licence of using, which was a non-*ius* that could be granted by the owner. One conspicuous feature of Ockham's account of licences was the point that the person who gives the licence also sets its terms. It seems like simple enough a point, but it is noteworthy because Ockham would later apply this principle to other aspects of his political thought.[13]

It is hard to imagine why the Michaelist stance on licences does not make sense. Why *must* we say that the beneficiary of a licence has either gained a right to use or he uses the thing unjustly? If the owner and the beneficiary agree that the latter has only a permission to use something without ever gaining any rights over it, then so be it. Franciscans are supposed to live by means of these licences, except that they also vow to live in this way, committing themselves to live in the precarious situation of those whose way of life and material comforts are decided entirely at the whim of another.[14]

Incidentally, it should be clear by now that neither Ockham nor the other Michaelists thought that Franciscan life depended mostly on the so-called natural rights, even those normally associated with extreme necessity. These two modes, either by licence or natural right, were two of the five general cases where an act of using may be considered licit. The other three ways one may have licit use of an object are: a person may use an unowned thing

[13] See p. 186 n. 44, above, for references. Gray, "Ockham on Trusts," 148, argued that Ockham may well have been influenced by English law in his treatment of licences, in that such law recognized "some act of using in which the beneficiary is unprotected." Perhaps; but he is clearly more deeply indebted to the Michaelist tradition.

[14] Such was the theory, anyway. A balanced analysis would have to admit that the pope had a point when he wrote that he has seen how Franciscan lack of lordship had done more harm than good. The claim was perhaps a bit hyperbolic, but one does get a sense that no amount of papal legislation regarding Franciscan poverty would ever stop the friars from both worrying and boasting about their poverty. Cf. Lambert, "Franciscan Crisis," 137–38.

by employing our generic power of using (without acquiring *dominium* if one wishes); an owner can use things he or she owns; and one who has some kind of use of right may also use the thing over which he or she holds the right.

We also looked at two problems commonly associated with Franciscan poverty, namely the use of consumables by non-owners and the nature of corporate poverty. With respect to consumables, Bonagratia laid the basic legal foundation for the argument that consumables admit a separation of use and lordship. Under Roman law, everyone who was *iuris alieni*—slaves and *filiifamilias* being the two most pointed examples—are unable to exercise proprietary lordship, yet they are able to use things at their master's pleasure. One finds a similar argument regarding members of religious orders in canon law.

The other Michaelists extended their criticism of the pope's position, but none offered a more cogent legal argument than Bonagratia, though Michael made virtually identical claims regarding the separability of use and lordship in consumables. Michael also attended to some of the pope's later objections, such as whether one can, properly speaking, 'use' a consumable. Part of this answer led to the point that we must imagine that the separation of lordship and use must be thought to (be able to) exist as long as the consumable itself exists. Both he and Francis based some of their arguments on the fact that even God's mediate lordship exists just that long as well, entirely separate from the use of the consumable in question.[15] The Michaelists also ridiculed the pope's argument that the act of using cannot be 'had' as specious reasoning.

Regarding the problem John posed in *Quia vir* about actions needing to be just, unjust, or neither, and that Franciscan use must be just, it seems that only Ockham gave a useful reply. Michael hardly addressed the problem, seemingly content with the idea that *Exiit* confirmed the Franciscan way of life as modelled on the life of Christ and the apostles, which clearly entails that the use of the things "licit to have" must be just without any property rights. The licence, he insisted, guaranteed that use would not be illicit. Francis's solution was hardly much better. As Francis saw it, we should not say that no "indifferent" act can be posited between just and unjust acts. An act may be just due to (*ex*) a temporal right of using and unjust due to "the opposite" of such a right. Michael, Francis explained, was positing an

[15] Cf. *OND* 41.84–93 (2:524).

act denuded of both these *iura*,[16] which is, presumably, what Ockham once called the bare use of fact.

Francis's position seems to amount to little more than an awkwardly phrased assertion that there are, with respect to rights of using, indifferent acts. Ockham agreed, but gave a much more comprehensible account of how this works. To do this, he built on the idea that not all actions need to be or can be studied in the light of positive law. Many are, of course, but when we are dealing with issues of morality, we should not think about an action being just only on the basis of legal justice. Actions may be just in a more metaphorical sense, but they remain just nonetheless. When one is speaking about the just use a friar is to exercise, it is of justice in this sense that we should speak. This is particularly true since the friars do not acquire legal rights when they are granted licences of using, only the permission to employ that most general power of using that was granted in common to humankind.

Finally, there is the issue of corporate poverty. Bonagratia's main contributions to this topic seems to be, first, that a corporation only "obtains the place of a person" (*obtinet … vicem personam*) in matters of *ius*, and not where the the action of a real person (*factum persone*) is required. This is, presumably, what John meant when he claimed that the Order could not have a use of fact only one of right because it was merely a "represented person." If so, then his rhetorical flourish, namely that the Order should only be considered a "represented and imaginary" person opened the door to a great deal of ridicule, and not all of it fair.

Bonagratia located the corporate ownership of the early community of believers in the entire community of believers: the things of the Church were basically (*quasi*) common to the whole community of the faithful, as was their lordship and ownership. We have here an allusion to Bonaventure's second of the four *communitates* of temporal things: this *communitas* is the one that exists by the *ius* of fraternal charity, whereby all things belong to the just.[17] Contemporary Franciscans may be said to live in much the same way.

Michael made the reference to Bonaventure's "communities" explicit. He also focused on the idea that corporations perform the function of a (legal) person, and that we can therefore compare the situation of a monk in a monastery to the Franciscan Order in society at large. Thus, while both Fran-

[16] See above, p. 245.

[17] See Appendix A below.

ciscans and Dominicans are perfect *personaliter* due to their renunciation of the third Bonaventuran community, Franciscans are also perfect *collegialiter* for having renounced the fourth community. According to Michael, corporations can have both things of fact and things of right; in the case of the Franciscans, they would have had a *usus iuris*, had they not renounced it.

Michael took the pope to task for suggesting that a corporation is an imaginary person: it was unskilfully said, he claimed, which is perhaps a sign that Michael recognized that John did not mean that corporations were truly imaginary, only that they only had legal personality. Francis and William either misunderstood the pope, or simply chose to do so on this point. Francis was concerned to show how it is possible for a group of people to have an action that a single individual could not. The example of ten men pulling one ship provides a good image for us to hold on to, but it might not seem to be *ad rem* in the case of a solitary friar eating a crust of bread.

Francis seemed to believe that a corporation of people was only as real as the people who comprised it, but Ockham said it clearly: "Fratres sunt ordo et ordo est Fratres."[18] If this was a position consistent with his logical individualism, it was no less consistent with the views of contemporary jurists. And we must surely imagine that the pope thought that if a corporation was anything, it was something made up of people. Regarding the problem of *usus facti* versus *usus iuris*, Ockham also agreed with Francis and Michael that groups of people can have real acts. The key to corporate lordship for all the Michaelists was the fact that we must consider the apostles, the college of apostles, as a distinct body within the Church. This apostolic college lacked rights exclusive to it, and the same was therefore true of the Franciscan Order of Ockham's day.

The one omission in Ockham's account, although it is clearly implied when you collect all his arguments about corporate poverty, is that in his emphasis to show that corporations *can* have rights, he forgot to insist that they do not *need* to have them.

## 2. *Legal* Catenae *in the* Opus nonaginta dierum

Ockham's misunderstanding of the pope's views on juristic personality, wilful or not, provides a nice segue to the question of how Ockham utilized the legal sources in the course of the *Opus nonaginta dierum*. Ockham's knowl-

[18] *OND* 62.271–272 (2:569): "The brothers are the order, and the order is the brothers."

edge and use of the law has piqued the interest of some in passing,[19] but it is an exceedingly difficult question to answer; consequently I have tried only to provide the rudiments of an answer here rather than a comprehensive one.

Ockham's citations of canon and civil law fall into two general categories. They either appear in a cluster, which I have designated a *catena*, or an individual reference will appear in relative isolation. Many of these *catenae* are due to Offler's vigilant eye rather than a direct quotation or citation of the sources in question. Many references, moreover, can be found in the other Michaelist texts, which may indeed be the source for Ockham's references. The presence or absence of legal references in the Michaelist corpus is an interesting issue. Roberto Lambertini recently argued that the *Improbatio* had to antedate the *Appellatio monacensis* because when the two make similar arguments Michael's text is more fully fleshed out with references to canon and Roman law.[20] After all, why would Francis strip out these useful and impressive-looking *catenae*? I do not find this as convincing an argument: a long list of references to, say, canon law would be mostly meaningless to someone who does not know the content of the *capitula* to which they refer. As Francis never formally studied law, unless he had access to the texts, it would seem reasonable to omit such references in his own text.[21]

Yet I agree with Lambertini's sentiment that the study of what was cited and how it was cited can be revealing. In my admittedly selective analysis, I opted to examine some of the more interesting *catenae*, either because they occur at significant points in the *Opus nonaginta dierum*, or because they seemed to deserve closer analysis. As Tierney noted, given Ockham's views on the relative merits of canonists and theologians, "it is a pleasing irony that" in certain cases "a little canonistic learning is needed to understand what Ockham, the theologian, was trying to convey to his readers."[22]

[19] Tierney, "Ockham, the Conciliar Theory," 45–46, noted the verbal similarity between a passage of the *Breviloquium* (2.21.14–35 [4:155–56]) and Guido's *Rosarium* ad D. 12 c. 2 (Venice, 1480); cf. Tierney, "'Only the Truth Has Authority,'" 73. Gagnér, "Vorbemerkungen," also argued that juristic sources must be considered in relation to Ockham's views, and this idea is at least implicit in Kriechbaum, Actio, ius *und* dominium.

[20] Lambertini, "Francesco d'Ascoli e la polemica," 295. Not that this was his only argument.

[21] See p. 297 n. 29, below, for an example of Ockham omitting a reference to the *Digest* for perhaps this very reason. Something similar can be seen in the quotation/paraphrase of *App. maior*, 255–56 at *Impug.* § 8 (246); see p. 299 n. 37, below.

[22] Tierney, "Natural Law and Canon Law," 19.

For this section I have employed a specialized system of notation that must be mentioned. References set in *italics* indicate that they are unique to Ockham, while a "(cf.)" indicates a suggestion made by Offler; if they are combined—viz, (*cf.*)—it means that it is a suggestion made by Offler that was not cited in the other texts. Also, in the following lists (only) I have written references to the *Glossa ordinaria* in a more economical manner than the standard style. Finally, the *catenae* listed below are numbered in the sequence in which they occur in the *Opus nonaginta dierum*,[23] but since I have not discussed each one, the numbers grow at an erratic pace.

*Catena 1*

The first significant cluster of references in the *Opus nonaginta dierum* comes early in the text, which deals with both the issue of how official appeals work and that Michael did so appeal. As Offler noted, much of this came from the letter *Quoniam omnis humana sententia*, although the relationship is slightly more extensive than Offler thought.[24]

1. Dig. 49.7.1 (cf.)
2. C. 2 q. 6 c. 31 (*cf.*)
3. C. 2 q. 6 c. 9
4. D. 40 c. 6
5. gl. D. 40 c. 6 (a fide devius) (cf.)
6. gl. D. 19 c. 9 (concilio)
7. D. 19 c. 9
8. X 5.7.13

There is not much to detain us here other than to note that Offler's suggestions are justified by their explicit appearance in this letter. This is clearly an example of William mixing direct quotation and paraphrase. There is, however, an addition and source that is anterior to both. The *Allegationes religiosorum uirorum* quotes the gloss *Concilio* directly and then suggests the reader look at the text and gloss of D. 40 c. 6, before pointing out any Catholic is superior to a heretical pope as it is proved in C. 24 q. 1 d.p.c. 4 and in the text and gloss of C. 24 q. 1 c. 1, which Ockham cited in his next cluster.[25]

[23] A *catena* in the present context means: at least three references in close proximity to one another, where the subject matter to which they refer remains approximately the same. However, noticeably longer lists may be included even if the subject matter evolves more rapidly. To include more than this would have greatly increased the size of this section.

[24] *OND* 1.34–78 (1:294–78); *Quoniam omnis humana sententia* is edited in G&F, 938–60, see 940–43. This was a response by "Nicholas the Minorite" to an earlier tract of Guiral Ot, who had been elected as Michael of Cesena's successor on 10 June 1329.

[25] *Alleg.*, 545–46. Ockham is listed as one of authors of this text.

LEGEND: (cf.) = not cited directly; *italics* = unique to *OND*; (*cf.*)= not cited directly, unique to *OND*

*Catena 2*

For this second cluster, Offler suggested the *Allegationes religiosorum uirorum* as a source.[26]

1. gl. C. 24 q. 1 c. 1 (in heresim)
2. Dig. 4.8.4 (*cf.*)
3. Dig. 36.1.13.4 (*cf.*)
4. X 1.6.20 (*cf.*)
5. X 5.7.13

This cluster shows us mainly that Offler probably read the Roman law texts more carefully than Ockham did. Ockham quoted a portion of the gloss to *in heresim*, which dismisses the "rule" that an equal cannot loose or bind an equal because a heretical pope is less than any Catholic. Michael quoted this section twice, both times a little more extensively than Ockham did, including the related gloss *Quod autem* (ad C. 24 q. 1 d.a.c. 1), which refers us to X 5.7.13.[27]

More interesting, however, is the part of the first gloss, which refers one to X 1.6.20 for the idea that equals have no power over equals.[28] Neither Michael nor Ockham referred to it even though it falls in the middle of the passage they quoted. In fact, Ockham modified the passage dramatically, shortening the overall length, and omitting the reference to the *Digest*.[29]

[26] Cf. *OND* 1.92–95 (1:295) and G&F, 547–48.

[27] *App. mon.*, 854–55. The concluding section to this text (851–65) deals with the conclusion that John had pertinaciously fallen into a great number of heresies; the question thus became "What to do now?" This gloss thus helped solve the problem because the pope no longer had any authoritative position in Christian society.

[28] X 1.6.20: "quum non habeat imperium par in parem." This reference was used explicitly on this point in the *3 opp.*, 508; however, it was not used in conjunction with these other references.

[29] Compare the differences between the quotations:

| *In haeresim*: | *App. maior*: | *App. mon.*: | *OND*: |
|---|---|---|---|
| Hic est casus in quo papa papam potest ligare: in quo papa in canonem latae sententiae incidit. Nec huic obuiat regula illa, quia par parem soluere uel ligare non potest. X 1.6.20. Quia si papa haereticus est: in eo quod haereticus est, est minor quolibet catho- | Hic est casus in quo papa canonem latae sententiae incidit. Nec obviat illa regula "par parem solvere vel ligare non potest," quia si papa est haereticus, minor est quolibet catholico; quia lex factum ipsum damnat sive notat etiam absque sententia, Dig. 23.2.43.13. | Hic est casus in quo papa papam ligare potest et in quo papa canonem latae sententiae incidit. Nec obviat illa regula, quia "par parem solvere vel ligare non potest," quia si papa est haereticus, minor est quolibet catholico, C. 12 q. 1 c. 9, quia lex factum | Hic est casus—*quando scilicet aliquis in haeresim labitur*—in quo papa in canonem latae sententiae incidit. Nec obuiat illa regula, "quia par parem solvere vel ligare non potest," quia si papa est haereticus, minor est quolibet catholico. (1.92–95) |

LEGEND: (cf.) = not cited directly; *italics* = unique to *OND*; (*cf.*)= not cited directly, unique to *OND*

Perhaps this is to be explained by the fact that it was missing in the versions of the gloss they consulted or because the idea was so familiar to readers of *Quo elongati* and *Exiit* that they felt no need to provide references for "that rule."[30] Gregory IX used this notion to declare that St Francis's *Testament* was not an officially binding document; and Nicholas III repeated the point in his own bull.[31] Bonaventure also made use of this maxim, and he did refer to X 1.6.20.[32] All these factors surely helped ensure that this idea would stick out in Ockham's mind well enough that he would remember it when he came to documenting the way appeals from the pope, particularly a heretical pope, worked.[33]

The allusions to Roman law are also easily explained: The gloss *In parem* refers to them in the order found in Offler's apparatus, along with several others that offered exceptions to this supposed rule.[34]

*Catena 5*

As we have seen, Ockham and his confreres insisted that the definition of *usus* as a *ius utendi* was a definition *in iure*.[35] This is indeed a gloss of Azo's, but there is no solid indication that Ockham knew it first-hand the way the Michael, Bonagratia, or John did.

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| | |
|---|---|
| lico. C. 12 q. 1 c. 9. (407–08) Quia lex factum notat etiam sine sententia. Dig. 23.2.43.13. | notat etiam sine sententia, Dig. 23.2.43.13. (854–55) |

[30] Although the context is admittedly different, in the *Dialogus* the *magister* makes a similiar point, but the authority given was Aristotle; see 3.1 *Dial.* 2.2.14–21 (8:167): "Sed iniustum est ut aliquis sibi similibus et equalibus principetur, quod Aristoteles, 3° *Politicorum*, c. 15° [sc. 3.16 1287a12–17], testari videtur cum dicit: 'Similibus secundum naturam idem iustum necessarium et eandem dignitatem secundum naturam esse, quare siquidem inequales equale alimentum habere vel vestimentum nocivum corporibus, sic habent et que circa honores, similiter autem et inequale equales: propter quod quidem nichil magis principari quam subici iustum'. Ex quibus verbis colligitur quod iniustum est ut aliquis sibi similibus et equalibus principetur."

[31] *Exiit*, 2:1120, and *Quo elongati* 12–38 (20–21); cf. 4 n. 1, where Grundmann incorrectly referred to Dig. 36.1.*12*.4.

[32] *Ap. paup.* 11.11 (BOO 8:314a).

[33] The same is thus probably true of *OQ* 1.15.4 (1:57) and 2.12.26–27 (1:91).

[34] *Glos. ord.* ad X 1.6.20, s.v. "In parem": "Sic D. 21 c. 4 et Dig. 4.8.4; Dig. 36.1.13.4. Nisi se subiiciat ei: ut Dig. 2.1.14; C. 2 q. 7 c. 41. Nisi ratione legationis. D. 93 c. 26. Vel delagationis. X 1.29.11."

[35] The following is based on *OND* 2.127–154 (1:301–302).

1. gl. Dig. 7.8.1.1(!) (nudus usus) (cf.)
2. Dig. 7.8.8 (*cf.*)
3. Dig. 7.8.12 (*cf.*)
4. Inst. 2.5.1 (cf.)
5. Dig. 7.1.1 (cf.)
6. Dig. 7.1.12.2 (*cf.*)
7. Inst. 2.4 pr. (cf.)
8. Inst. 2.5.1 (cf.)
9. *D. 1 d.p.c. 5*

Following the allusion to Azo, Ockham argued that he who has a bare use of a farm also has the right to stay on the farm if he so wishes. A cursory look at the references to Dig. 7.8 shows that they are too far off-topic for Ockham to have had them in mind.[36] Inst. 2.5.1 is concise and to the point, and clearly Ockham's (ultimate) source. The *Appellatio maior* reads, quoting from Azo's *Summa institutionum*:

> Et dominus Azzo in *Summa institutionum*, *De usu et habitatione* [2.5]: "Unde et is cui usus domus relictus est, habet ius habitandi cum familia sua in ipsa domo, Dig. 7.8.2. Et is cui usus fundi relictus est, habet ius morandi in fundo et fructus quosdam percipiendi ex eo, Dig. 7.8.10; et in Inst. 2.5.1.…" [37]

It is a little more interesting for the remaining four references to Roman law, which Offler suggested for Ockham's claim that usufruct is a 'fuller' right (*pinguius ius*) than bare use, though they both belong to the category of *usus iuris*. It is thicker because the usufructuary is able to sell, loan, and grant his entire *ius* to someone else. Dig. 7.1.1 and Inst. 2.4 pr. both explain that usufruct is a right of using another's goods with the substance preserved. Michael gave this very definition, although he misleadingly referred his readers to the text and gloss of Dig. 7.8.1, which merely explains that bare use, which is "sine fructu," is established in the same way usufruct is; it was only the gloss that he was quoting from.[38] The idea that usufruct is a more expansive right than bare use is implicit in Dig. 7.1.12.2, which includes the important point that the usufructuary can enjoy (*frui*) the thing himself or "grant, lease, or sell the [right to the] enjoyment to someone else" (*alii fruendam concedere vel locare vel vendere*), for selling and leasing are forms of

[36] Dig. 7.8.12, in fact, is composed of many subsections, all of which descend into overly detailed particulars well beyond Ockham's needs.

[37] *App. maior*, 255: "And lord Azo in his *Summa institutionum*, *De usu et habitatione*: 'Hence, also, he to whom the use of a house has been left has the right of living in that house with his family: Dig. 7.8.2. And he to whom the use of a farm has been left has a right of staying on the farm, and of receiving some fruits from it: Dig. 7.8.10; and in Inst. 2.5.1.…'" This passage is not in the *OND*; a verbatim, but condensed version (of *App. maior*, 255–56), which conspicuously omits the references to Roman law, can be found in *Impug.* § 8 (246).

[38] *App. maior*, 255; *App. mon.*, 829. This error is perhaps due to his quotation of Azo's *Summa institutionum* to Inst. 2.5. See the discussion on p. 349.

LEGEND: (cf.) = not cited directly; *italics* = unique to *OND*; (*cf.*)= not cited directly, unique to *OND*

use. A similar point is made in Inst. 2.5.1, which begins, moreover, by saying that "there is less right in use than in usufruct" (*minus iuris est in usu quam in usu fructu*). This is clear because the holder of bare use can use the things over which he holds use, but he cannot "sell, lease, or freely grant" (*vendere aut locare aut gratis concedere*) the way a usufructuary can.[39] Michael quoted this passage from the *Institutes* twice, as did Francis in a rather confused way, which suggests that he knew of the idea only second-hand.[40] It seems fair to assume that Ockham merely followed Michael on this point, and added the commonsense point that "bare" was added in order to distinguish it from usufruct (*"nudus" additur ad differentiam ususfructus*).

The situation seems to be a little different with the allusion to D. 1 d.p.c. 5, and perhaps its *capitulum*.[41] The casual reference to *consuetudo* as either written or unwritten law, but principally unwritten law, corresponds well enough to Gratian's conclusion. The fact that Ockham alluded to this passage in two other places while the other Michaelists never did clearly suggests that Ockham had some direct acquaintance with this portion of the *Decretum*.

*Catenae 6 & 23*

These two groups of references are linked by the distinction between the *ius fori* and *ius poli*, which is mentioned in *Exiit*, but is also found in C. 17 q. 4 c. 43 and in the "Casus" to C. 17 q. 4 d.p.c. 42.[42]

1. *C. 12 q. 2 c. 67*
2. *C. 16 q. 4 c. 2*
3. *C. 12 q. 2 c. 75*
4. *C. 3 q. 1 c. 1*
5. *C. 3 q. 2 c. 4*
6. VI 5.12.3 (*Exiit*)
7. C. 17 q. 4 c. 43

1. *C. 17 q. 4 c. 43*
2. *C. 17 q. 4 d.p.c. 42*
3. D. 6 d.p.c. 3
4. *D. 8 c. 2*
5. *D. 1 c. 2*
6. *D. 4 c. 3*
7. gl. C. 17 q. 4 c. 43 (non iure poli) (*cf.*)

These are found in crucial chapters in Ockham's theory of property. The second chapter lays out many of Ockham's definitions that he returned to again and again; and the sixty-fifth chapter is where Ockham responded to the pope's argument that since all licit use must, *ipso facto*, be just use, and therefore must include a right of using. John cited X 5.40.12 and C. 14 q. 4 c. 11

[39] It is also in *Glos. ord.* ad Inst. 2.4 pr., s.v. "Fruendi."

[40] *App. maior*, 256; *App. mon.*, 832–33. For Francis, see nn. 25, 27, and 28 on p. 347.

[41] See p. 334 n. 1 for a discussion of this point.

[42] See *OND* 2.338–376 (1:306–07), and 65.34–89 (2:573–75).

LEGEND: (cf.) = not cited directly; *italics* = unique to *OND*; (*cf.*)= not cited directly, unique to *OND*

in his favour; Ockham fired back with a series of references.[43] Brian Tierney has already pointed out that a look at the *Glossa ordinaria* is revealing at this point, but I think more can be said.[44]

Let us start with Tierney's suggestions, however. The idea is that Ockham probably reformulated what he found in X 5.40.12 (*Ius dictum*) and its glosses when he wrote that the *impugnatores* maintain that *ius* is sometimes taken for *ius fori* and sometimes taken for *ius poli*, which is a distinction taken from Augustine's *De vita clericorum* and placed in C. 17 q. 4 c. 43 (*Quicumque uult*). Ockham then quoted from it and noted that the same idea could be found in the preceding *pars Gratiani*.[45] There is no question that Ockham looked up *Ius dictum*: he quoted from it a little later on, and, as Tierney noted, used language that seems closely related to the *Glossa ordinaria*.[46]

The glosses to *Quicumque uult* also deserved some attention. Ockham famously linked the *ius poli* of *Exiit* to *aequitas naturalis*; but this is not an example of Ockham's voluntarism as much as it is a sign that he read the gloss *Non iure poli*.[47] There should be no surprise that he linked these concepts to natural law when we note that he also cited D. 1 c. 7,[48] since that *capitulum* links *ius naturale* to natural equity.[49]

In some ways the other *causae* are more interesting. Ockham quoted from several distinct *capitula*, which no one else utilized, in quick succession, and there is no real link to be found among them through the *Glossa ordinaria*, with a few inconsequential exceptions.[50]

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[43] He cited canon law exclusively over the course of the chapter: C. 17 q. 4 d.a.c. 43; D. 6 d.p.c. 3; D. 8 c. 2; D. 1 c. 2; D. 4 c. 3; *Glos. ord.* ad C. 17 q. 4 c. 43, s.v. "non iure poli" (cf.); *Exiit* (VI 5.12.3); C. 23 q. 7 c. 1; D. 47 c. 8; D. 1 c. 7; X 5.40.12; C. 14 q. 4 c. 11.

[44] See Tierney, *Idea of Natural Rights*, 124–29.

[45] *OND* 65.34–39 (2:573): "Circa primum dicunt quod hoc nomen 'ius' aliquando accipitur pro iure fori, aliquando pro iure poli. Ista distinctio colligitur ex verbis Augustini de vita Clericorum, quae ponuntur C. 17 q. 4 c. 43; qui ait: *In potestate habebat episcopus non reddere, sed iure fori, non iure poli*; et ex eisdem causa et quaestione, § *Sed notandum* (d.p.c. 42), habetur eadem distinctio." The following lines are quoted and discussed above, p. 115.

[46] *OND* 65.264–265 (2:579) and 277–279 (2:579). See Tierney, *Idea of Natural Rights*, 126 n. 74; cf. *Glos. ord.* ad X 5.40.12 (Casus). The glosses *Hoc enim iure* and *Male autem* direct the reader to John's C. 14 q. 4 c. 11.

[47] *Glos. ord.* ad C. 17 q. 4 c. 43, s.v. "non iure poli": "id est quadam naturali equitate." See Parisoli, "Ockham e la fonte dei diritti naturali," 44–48, for an extended discussion of natural equity in Ockham; cf. now Miethke, "*Dominium*, *ius* und *lex*," 254–55.

[48] See above, p. 97 n. 156, for the passage in question; cf. Tierney, *Idea of Natural Rights*, 128, who, accidentally no doubt, wrote D. 1 c. 8.

[49] The idea is also found in *Glos. ord.* ad D. 5 d.a.c. 1, s.v. "cepit," on which, see below, p. 306.

[50] *Glos. ord.* ad C. 3 q. 1 c. 1, s.v. "nullum crimen," refers to C. 3 q. 2 c. 4. Likewise, *Glos. ord.* ad D. 8 c. 2, s.v. "Peregrini" cites D. 41 c. 1, which Ockham quotes from earlier on (*OND*

Another significant feature of these references is that the unique *capitula* of the early distinctions stand apart from the other references not only in the sense that others never employed them, but also that Ockham quoted them directly and that the *Glossa Ordinaria* to the other *capitula* of these clusters does not point to them. This seems to be further evidence that Ockham had access to and read for himself these early distinctions.

*Catena 7*

This passage occurs in the middle of a long discussion of what Chrysostom meant in D. 88 c. 11 about loaning money.[51]

1. Dig. 13.6.3.6 (cf.)
2. Dig. 13.6.4 (cf.)
3. gl. X 5.19.8 (de feudo) (cf.)
4. Hostiensis, *Sum. aur.* ad X 5.19 (cf.)

At this particular point Ockham was explaining that one who loaned money could not demand back more than the value of the money, but that one who loaned money *ad pompam* can, according to the laws, get back more than just the value of the money (*secundum leges potest aliquid recipere ultra pecuniam*). This is due to the fact that someone who does not gratuitously hand over money *ad pompam* still retains lordship of the money.[52]

The larger context was that use and lordship were considered separable in certain cases, even according to the *ius commune*. As Offler noted, Michael made a similar point in the *Appellatio monacensis*, where he clinched his argument thus: "sicut probatur per id quod legitur et notatur X [5.19] *De usuris*, [c. 8] *Conquestus*, in glossa Bernardi et per Hostiensem, in *Summa de usuris*, versu 10 et ff. [13.6] *Commodati*, l. [3], [§] paenultima et lege sequenti."[53] Offler's references are to the point, better in fact than Michael, who suggested § 5 rather than § 6 of Dig. 13.6.3, which is presumably due to

3.112–115 [1:314]), but in an entirely different context. Less relevant: *Glos. ord.* ad C. 16 q. 4 c. 2, s.v. "possessum," points to C. 8 q. 4 c. 1, C. 2 q. 6 c. 2, and C. 16 q. 3 c. 6 (for which see also the glosses to *Inconcussam* and *Arbitris*); the gloss *Dominio* points to a slightly ambiguous "ff. de uerbo sig. Interdum," which I take to refer to Dig. 50.16.78, since it is the only *Interdum* that deals with proprietary 'definitions.' In all cases, only Michael refers to these references, and none occur in connection with the context in which Ockham was using C. 3 q. 1 c. 1. A similar argument could be made about the gloss *Iudicent* to D. 4 c. 3; in this case the references are seen scattered throughout the *Alleg.*

[51] For discussion see Lambertini's excellent article, "*Usus* and *usura*."

[52] *OND* 3.329–333 (1:319); cf. 3.629–630 (1:327).

[53] *App. mon.*, 832: "just as it is proved through that which is read and noted in X 5.19.8, in the gloss of Bernard, and through Hostiensis in the *Summa de usuris*, verse[?] 10, and Dig. 13.6.3.5 and 13.6.4."

LEGEND: (cf.) = not cited directly; *italics* = unique to *OND*; (*cf.*)= not cited directly, unique to *OND*

his reliance on Hostiensis's *Summa*.[54] Ockham's case is even more straightforward. At *OND* 3.330 he left the allusion implicit, as he did at 14.111 and 109.257–259.[55] However, at 32.186–193 Ockham wrote that it was a gloss to X 5.19.8 (i.e., *de feudo*) that showed that one lent money *ad pompam* only had a right to use the money, not ownership of it. He did not specify the gloss, much as Michael had not, and one gets the impression that his knowledge of the sources for this claim was fairly limited. That is, although he wrote "secundum leges" (3.330) and "secundum iura" (109.258), Michael again seems the proximate source. In fact, when John cited Dig. 13.6.3.6 as part of his proof that neither usufruct nor a right of using can be established or had in consumables, Ockham did not take the opportunity to turn the *Digest* passage against him as we might expect.[56] However, it is conceivable that Ockham knew of Bernard's gloss first-hand.

*Catenae 8 & 17*

The eighth and seventeenth clusters are identical except only the latter includes the direct quotation from the *Decretum*; however, this *capitulum* is found some lines above the first cluster.[57] Both are related to a discussion of Chrysostom; the first of these is still part of the lengthy discussion raised in the seventh *catena*.

1. Dig. 4.4.16.4 (*cf.*)
2. gl. Cod. 4.44.2 (humanum est) (*cf.*)
3. gl. X 3.17.3 (deceptione) (*cf.*)
4. gl. X 5.19.6 (comparant) (*cf.*)
5. *C. 14 q. 3 c. 1(!)*

Here the issue is how it is that both parties of a contract are allowed to deceive each other (*licet contrahentibus se ad invicem decipere*). The first four references are related through their glosses. *Humanum est* points to the paragraph in the *Digest*, and a gloss to that paragraph (*Naturaliter licere*) points us to the corresponding *lex* in the *Code*.[58] The gloss *Deceptione* is

[54] See Hostiensis, *Summa aurea* ad X 5.19, n. 7 (1622): "Decimo, quando pecunia commodatur ad pompam, ff. commoda⟨ti⟩. l. 3. §. pe. & l. seq." [i.e., Dig. 13.6.3.5 and 13.6.4]. I am not entirely sure what "versu 10" means, but this section of the *Summa aurea* (n. 7) lists twelve cases where the general prohibition against usury fails.

[55] For the second case, Offler listed Dig. 13.6.3.6 and *STh* 2a2ae.78.1 ad 6 (9:156) as a possibility. For Aquinas's connection here to this part of the *Digest*, see Aubert, *Le droit romain*, 73.

[56] Cf. *OND* 39.1–32 (2:518–19) with G&F, 575. Yet this passage of Roman law was not one-sided; see, e.g., *Glos. ord.* ad Dig. 13.6.3.6, s.v. "Consumitur": "unde pani improprie dicitur commodari."

[57] *OND* 3.365–368 (1:320), and 40.82–90 (2:521); for the first reference to C. 14 q. 3 c. 1, see *OND* 3.269–270 (1:318).

[58] *Glos. ord.* ad Dig. 4.4.16.4, s.v. "Naturaliter licere."

LEGEND: (cf.) = not cited directly; *italics* = unique to *OND*; (*cf.*)= not cited directly, unique to *OND*

the key here,[59] for it combines elements of the glosses *Naturaliter licere* and *Humanum est*:

> *Deceptione:* Si uero dolus non dat causam contractui, nec incidit in contractum, sed deceptus sum ultra dimidiam iusti pretii in uenditione: obtinent quod hic dicitur, et infra X 3.17.6 et Cod. 4.44.2. Si autem sum deceptus minus dimidia iusti pretii, non possum agere ad aliquid: quia *licitum est contrahentibus sese inuicem decipere usque ad dimidiam iusti pretii.* Dig. 4.4.16.4.[60]
>
> *Humanum est:* Secus de rigore iuris, cum *licuit contrahentibus sese decipere*: ut Dig. 4.4.16.4. Sed ille rigor mitigatur, cum est immensa deceptio: sicut et quando inest dolus.[61]
>
> *Naturaliter licere:* id est de iure gentium: ut infra Dig. 19.2.22.3. Tenet enim contractus nihilominus: sed deceptus, si quidem re ipsa, minor restituitur: pro leui damno etiam, non pro minimo: ut supra Dig. 4.1.4. Maior non, *nisi ultra dimidiam iusti pretij* sit deceptus: ut Cod. 4.44.2 et Cod. 4.44.8. Si autem ex proposito, incidenter tamen, agitur ex eo contractu: ut infra Dig. 19.1.13.4. Et diximus supra Dig. 4.3.7 pr.[62]

A simpler solution, however, would be to do away with all these complications and look only to the gloss *Comparant*. As Ockham said, he will avoid talking about how all these laws should be understood for the sake of brevity.[63] The very words I quoted above can be found in this gloss, along with references to these other passages to the *Digest*, *Code*, and *Decretales*

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[59] In fact, Offler also referred to *STh* 2a2ae.77.1 (9:148) on this point (OPol 2:521; not 1:320), as does a gloss to the gloss *Deceptione* in a 1582 (Rome) edition of the *Corpus iuris canonici* (3:1124); see the online edition hosted by UCLA: `http://digital.library.ucla.edu/canonlaw/index.html` [last accessed 2011 10 25].

[60] "Certainly, if the fraud does not give a reason for the contract, and it does not occur in the contract, but I have been deceived beyond half of the just price in the sale, then they obtain what is said here, and below in X 3.17.6, and in Cod. 4.44.2. But if I have been deceived for less than half of the just price, I cannot take action for anything because people who make contracts among themselves are allowed to deceive each other up to half of the just price: Dig. 4.4.16.4." The gloss gives a misleading reference: "ff. de mino. in causae. §. in pretio." However, this paragraph of the *Digest* begins: "Idem Pomponius ait in pretio."

[61] "It is otherwise by the inflexibility of the law, since it was permitted for people who make contracts among themselves to deceive each other, as in Dig. 4.4.16.4. But that inflexibility is mitigated, when there is an immense deception. The same is true when fraud is present." On *rigor iuris*, see the references at p. 74 n. 40, above.

[62] "That is, by the law of nations, as below, in Dig. 19.2.22.3. Indeed, for the contract nevertheless holds. But, having been deceived, a minor is restored with the thing itself: [and] for a slight loss even, [but] not for the slighest, as above in Dig. 4.1.4. Not so for an elder person, unless he was deceived for more than half of the just price, as in Cod. 4.44.2 and Cod. 4.44.8. However, if by design, still incidentally does he take action on the basis of that contract, as below in Dig. 19.1.13.4. And we said it above, in Dig. 4.3.7 pr."

[63] *OND* 3.365–368 (1:320).

(not, though, to their glosses). We are thus left with the conclusion that much like a gloss to X 5.19.8, Ockham perhaps had the opportunity to read a gloss to X 5.19.6 as well.

The quotation from the *Decretum* cannot be explained by any obvious cross-references, and since the other Michaelists did not cite it, it seems to be further evidence that Ockham found it for himself. It is a little mysterious, too, that the second time he cited the *capitulum*, he claimed it was from the second question of the fourteenth *Causa*, rather than the third, though mistakes of this sort are easy to make. Regardless, there is no doubt that he knew the *capitulum*'s contents well enough to quote from it, and the same must be true of the gloss as well, for it is there that one finds the insistence that *dominium* is transferred in a *mutuum* when dealing with consumables.[64]

*Catena 9*

The discussion here has to do with the ubiquitous idea that necessity has no law.[65]

1. C. 1 q. 1 d.a.c. 40 (*cf.*)
2. X 1.4.4 (cf.)
3. X 3.46.2 (cf.)
4. X 5.41.4 (cf.)

Offler noted that the idea can be found in these *capitula*, but also pointed out that the idea might be taken directly from Bonagratia, who cited the three capitula from the *Decretales*.[66] In fact, both he and Michael cited them in this order: X 3.46.2, 1.4.4, and 5.41.4, where both also gave the wrong incipit for the first reference ("Sicut" instead of "Consilium nostrum").[67] Ockham provided no references; presumably his source was Michael and Bonagratia, but that he felt the idea needed no authoritative support to be considered valid. In fact, Ockham had made a similar point in his academic works. In a question on whether the will can have a virtuous act with respect to an object about which it has made an erroneous judgement, Ockham uses the example of an indigent person who is erroneously considered not to be needy. What is important to us is that it is taken as axiomatic that right reason would dictate that such a person should be helped in extreme

[64] The quotation at *OND* 40.87–88 (2:521), in fact, is a direct quotation of the gloss *Plusquam* to C. 14 q. 3 c. 1.

[65] *OND* 3.416 (1:322).

[66] *De paup.*, 505.

[67] *App. maior*, 336; see above, p. 108, for a quotation. The explanation for this mix-up might lie in *Glos. ord.* ad X 5.41.4, s.v. "Necessitas": "Hoc ideo dicit, quia necessitas legi non subiacet: supra de obser. ieiu. c. ij. in fine [X 3.46.2] et supra de consue. quanto [X 1.4.4] et D. 1 de cons. sicut [D. 1 de cons. c. 11] et D. 3 peruenit [D. 3 de cons. c. 12]…."

LEGEND: (cf.) = not cited directly; *italics* = unique to *OND*; (*cf.*)= not cited directly, unique to *OND*

necessity: the idea was self-evident (*evidens ex notitia terminorum*).[68] As Franck Roumy has shown, it was hardly a novel position to take.[69] There is no reason, then, to assume that Ockham had any knowledge of where in canon law this idea might be found this early on, unless he was looking at Michael's or Bonagratia's references to the *Decretales*.[70]

*Catena 10*

Here Ockham was explaining the nature of a *res nullius*.[71]

1. Inst. 2.1.47 (*cf.*)
2. Dig. 41.7.1 (*cf.*)
3. Dig. 45.3.36 (*cf.*)
4. Inst. 2.1.12 (*cf.*)
5. Dig. 41.1.3 pr. (cf.)
6. VI 5.12.3 (*Exiit*) (cf.)
7. D. 5 d.a.c. 1 (cf.)
8. D. 6 d.p.c. 3 (cf.)

The linkages between the Roman law passages are clear. Apart from Dig. 45.3.36, which is surely the least relevant *lex* in this context, the others fall into place thus. A gloss to Inst. 2.1.47 (s.v. "desinit") refers the careful reader to Dig. 47.7.1. On the other hand, Inst. 2.1.12 and Dig. 41.1.3 pr. form an obvious pair. Inst. 2.1.12–17 is largely based on Dig. 41.1.1 pr.–41.1.5: at times the text is even identical.[72]

The second half of this chain occurs a few lines later; at this point, Ockham was explaining that it is not licit for anyone to renounce a *potestas utendi*, which may indeed be exercised over *res nullius* without acquiring *dominium* over the thing in question. Ockham suggested that, in this con-

[68] Ockham, *Quaestiones variae* 8.1.58–64 (OTh 8:411): "Exemplum: aliquis indiget extrema necessitate. Sit ita. Et per consequens recta ratio, si inesset alicui potenti, dictaret quod tali est subveniendum tamquam indigenti extrema necessitate. Sed ratio errans errore invincibili potest iudicare quod talis non est sic indigens, et per consequens potest iudicare quod tali tamquam sic indigenti non est sic subveniendum." And *Quaestiones variae* 8.2.309–311 (OTh 8:423): "ponatur aliquis habens istam rationem universalem rectam 'omni indigenti extrema necessitate est benefaciendum ne pereat' quae est evidens ex notitia terminorum." These examples were noted by Miethke, *Ockhams Weg*, 489 and n. 215.

[69] Roumy, "L'origine et la diffusion." Cf. the use in *Regula non bullata* mentioned above, p. 105 n. 199, though it is doubtful that Ockham knew earlier versions of the Franciscan Rule.

[70] *AP* 8.47–52 (1:1:256), however, cites X 5.41.4 and D. 5 de cons. c. 26; *Glos. ord.* ad X 5.41.4, s.v. "Necessitas" connects the two, along with the other *capitula* of the *Decretales* mentioned here in this cluster. (*Glos. ord.* ad X 3.46.2, s.v. "Necessitas" points forward to X 5.41.4.) See also 3.1 *Dial.* 2.20.160–169 (8:208–09), where he both demonstrates knowledge of the gloss to this *capitulum* and cites some of the same *catena* that Michael and Bonagratia used on this point. See also *App. maior*, 265, 359, and 397. Read Shogimen, "Ockham's Vision," 168 and n. 26, in light of the claims made here.

[71] *OND* 4.209–217 (1:303).

[72] The glosses are not, but *Glos. ord.* ad Dig. 41.1.3.2, s.v. "desinit" refers back to Inst. 2.1.12.

text, the *Appellatio maior* referred to these passages of the *Decretum*, where he explains that we are necessarily obliged to conserve our life and that a use of things necessary for sustaining human life falls under a precept of natural and divine *lex*. Michael listed cited several *capitula* in defence of this claim.[73]

Bonagratia also used these references, but his purpose was slightly different. This time they supported the belief that the use of all things was common to all of humankind by natural and divine *ius*; division into 'mine' and 'yours' is a consequence of human *ius*.[74] In his *De paupertate*, both these topics coincide. A use of fact for the sake of conserving one's life comes from natural *ius*, not some (human) legislation (*constitutio*); since *iura naturalia* remain immutable, this is an irrenounceable feature of human existence. Possesssions and property rights (*proprietates*) come from human *ius*, however, and are renounceable, as the example of Esau demonstrates (Gen. 25:33).[75]

The implication for Ockham is clear. In all cases here, he would not need to rely on any first-hand knowledge of the legal *corpora*, but could make these claims based only on his knowledge of the basic Michaelist position. The references to Roman law seem particularly unlikely. However, Ockham did quote from D. 6 d.p.c. 3 in another, important, context,[76] and so, given their close connection to each other, it is not surprising that Offler suggested D. 5 d.a.c. 1 in this context, nor is it impossible that Ockham did not have it in mind.

*Catena 12*

As Table C.1 should make clear, we do not need to go too far afield to explain any of the references to C. 12 q. 1; the *quaestio* itself—whether clerics are allowed to have anything of their own (*utrum liceat clericis proprium habere*)—is telling.

1. C. 12 q. 1 c. 8
2. C. 12 q. 1 c. 9
3. C. 12 q. 1 c. 2 (*Dilectissimis*)
4. C. 12 q. 1 c. 8

[73] *App. maior*, 232, citing D. 5 d.a.c. 1, D. 6 d.p.c. 3, D. 19 c. 1, *Dilectissimis*, and *Quo iure*.

[74] *App. ACC*, 102–103, citing Inst. 2.1.1, D. 5 d.a.c. 1, *Quo iure*, *Dilectissimis*, D. 5 d.a.c. 1, D. 35 c. 8.

[75] *De paup.*, 503, citing D. 5 d.a.c. 1, D. 35 c. 8(!), D. 1 c. 7, Inst. 1.2 pr., Dig. 1.1.1.3, D. 5 d.a.c. 1, D. 6 d.p.c. 3, Inst. 1.2.11 (actually quoted before D. 5 d.a.c. 1, but only mentioned here), *Quo iure*, Inst. 2.2 (per totum), C. 7 q. 1 c. 8, and Dig. 21.1.14.9.

[76] See above, p. 300.

Here Ockham was explaining that those who live a common life are sustained from common properties; he followed this with references to the monastic rules of Augustine and Benedict.[77] Michael did precisely the same thing in the *Appellatio monacensis*.[78] However, there are two good reasons for thinking that Ockham looked at this part of the *Decretum* himself. First, he knew that c. 9 came from "Pope Urban,"[79] a point that is never made in the other references to this *capitulum*. Second, Ockham referred often to this section of the *Decretum*, and so he is likely to have wanted to read this portion if he had the chance.

This second reason may also explain the unique reference to C. 12 q. 1 c. 21, which is paired with C. 1 q. 1 c. 21.[80] Ockham was in the middle of an explanation of the difference between "thicker" and "thinner" (*pinguius*; *minus pingue*) forms of *dominium*. The difference is due to the fact that sometimes the *dominium* in question does not allow one to sell, give away, or bequeath something, though generally in civil and canon law *dominium* indicates the power to do these three things. At this point Ockham quoted from these two *capitula*. Michael quoted exactly the same portion of C. 1 q. 1 c. 21 in a related context, namely that monks do not have this power, but his string of references do not include any Ockham cited.[81] There is a partial exception. Ockham did at one point explain that *dominium* as it was understood in civil law meant a power of alienating, selling, giving away, bequeathing, or using a thing as one pleases. Along the way he mangled a reference to Cod. 4.35.21, which Michael had employed on a few other occasions.[82]

*Catenae 13 & 14*

These are two related passages,[83] and they should be looked at in conjunction with *catena* 9, where the passage from the *Decretales* is discussed. In the first the claim is that in times of extreme need one may take, and even sell, something that belongs to another in order to preserve one's own life. The second passage employs the idea that necessity has no law. The obvious

[77] *OND* 9.532–578 (2:394–95).

[78] *App. mon.*, 675; cf. 834–35.

[79] It is in fact one of the so-called Pseudo-Isidorean decretals.

[80] *OND* 2.416–421 (1:308).

[81] *App. mon.*, 815–16, citing Cod. 4.35.21, C. 1 q. 1 c. 21, Cod. 4.38.14, Inst. 2.1.40.

[82] *App. maior*, 277; *App. mon.*, 810 and 827; *OND* 4.648–651 (1:344–45). The first and last of Michael's references to Cod. 4.35.21 could be the source for Ockham's quasi-quotation.

[83] See *OND* 11.630–646 (2:422), and 23.367–379 (2:477).

common thread is *Exiit*, but there are reasons for agreeing with Offler's wider list.

1. X 5.41.4 (cf.)
2. VI 5.12.3 (*Exiit*) (cf.)
3. gl. D. 1 c. 7 (communis omnium) (cf.)
4. gl. D. 47 c. 8 (commune) (cf.)

1. gl. Dig. 1.10.1.1 (expedire) (cf.)
2. D. 1 de cons. c. 11 (cf.)
3. C. 1 q. 1 d.a.c. 40(!) (cf.)
4. VI 5.12.3 (*Exiit*)

Bypassing *Exiit*, it is a well-known canonistic idea that things are to be shared in times of necessity. Two different glosses to D. 1 c. 7, *Ius naturale*, make this point (s.vv. "ius naturale" and "communis omnium"), and the same is true for D. 47 c. 8, *Sicut hii*, where the gloss *Commune* is also worth mentioning. Michael quoted the relevant part of the second *capitulum* while Bonagratia cited both of these *capitula*, though in each case without the gloss.[84] Ockham quoted from the second of these, more extensively than did Michael or Bonagratia, although there is overlap.[85] The gloss *Commune* reiterates the idea that things are to be shared in moments of necessity, and gives several references to the *capitula* of C. 12 q. 2, which were popular among the Michaelists. It is not unreasonable to think that Ockham had direct knowledge of the glosses to D. 47 c. 8,[86] but the source may also be Bonagratia or Michael, whose citations overlap to a very significant degree when discussing the duty to share in times of necessity.[87]

It is a different story for the gloss *Ius naturale*. In this case even though (only) Bonagratia's *De paupertate* cited this *capitulum*, Ockham was clearly familiar with its contents. He referred to it on three different occasions, once even quoting the gloss that explains things should be shared in times of necessity.[88] On the other occasions he quoted from different parts of different glosses.[89] There is no question that Ockham had access to this part of the *Decretum* and read it for himself.

*Catena* 14 was suggested for Ockham's reiterated point that necessity is subject to no law. These texts are germane, but again we do not need to go further than Ockham's fellow Michaelists, or *Exiit*, for this idea. In addition

[84] *App. maior*, 336; Bonagratia, *De paup.*, 503 and 504. For Bonagratia the context was not quite as similar as it was for Ockham and Michael.

[85] *OND* 65.129–131 (2:576) and 141–147 (2:576).

[86] See also *OND* 77.343–344 (2:632), and *Glos. ord.* ad D. 47 c. 8, s.v. "Aliena."

[87] *De paup.*, 505, and *App. maior*, 336.

[88] *OND* 27.147–148 (2:488); see p. 99, above, for a quotation.

[89] See *OND* 65.201–202 (2:578); 65.255 (2:579); and 91.27–32 (2:666).

LEGEND: (cf.) = not cited directly; *italics* = unique to *OND*; (*cf.*)= not cited directly, unique to *OND*

to what was said above in *catena* 9, we should note that Michael once cited D. 1 de cons. c. 11 to point out that necessity can make licit what is normally not licit.[90]

*Catena 20*

This group of references is very revealing. At this point Ockham was defending the sanctity of individual rights: unlike licences, no one is to be deprived of his or her *ius* without cause or fault.[91] The only passages which Ockham directly quoted are the two early distinctions of the *Decretum*, yet, on the whole, this passage is an important one.

1. *D. 1 c. 2*
2. *gl. X 1.2.2* (*culpa caret*)
3. *gl. X 4.13.11* (*sine sua*)
4. *gl. D. 22 c. 6* (*priusquam*)
5. Dig. 47.10.13.1 (*cf.*)
6. Dig. 50.17.155.1 (*cf.*)
7. *D. 3 c. 3*
8. Dig. 1.3.31(30) (cf.)
9. X 3.31.18 (*cf.*)

As we have seen, this distinction was of paramount importance for the Michaelist defence of Franciscan poverty. As such we should expect to see some overlap in the sources Ockham cited. But there is none, except for Dig. 1.3.31(30), the famous passage where the emperor is declared to be freed from the laws (*legibus solutus*), which Ockham certainly alludes to, but does not actually quote; it is cited twice in the *Allegationes religiosorum uirorum*, which may be Ockham's source.[92] We can also safely dismiss the other Roman law passages. They were suggested because Ockham claimed that prosecuting one's *ius* causes injury to no person (*nec alicui facit iniuriam, qui ius suum prosequitur*); Dig. 47.10.13.1 is a possibility,[93] but the similarities are not close enough to be entirely convincing.

The most interesting part are the three glosses. Ockham, and only Ockham, referred to them to make his point. The glosses to the two *capitula* from the *Decretales* are very similar in content; neither point to the other, but both do point to D. 22 c. 6, which may have inspired Ockham to take a look for himself. Regardless, although he did not actually quote from them,

[90] *App. mon.*, 790, citing X 5.41.4, D. 1 de cons. c. 11, D. 5 de cons. c. 26, and C. 25 q. 1 d.p.c. 16.

[91] *OND* 61.50–94 (2:559–60); cf. 3.395–416 (1:321–22).

[92] *Alleg.*, 534–35.

[93] "Is, qui iure publico utitur, non videtur iniuriae faciendae causa hoc facere: iuris enim executio non habet iniuriam."

LEGEND: (cf.) = not cited directly; *italics* = unique to *OND*; (*cf.*)= not cited directly, unique to *OND*

he knew that the *Glossa ordinaria* defended the sanctity of individual rights in the same way he did.[94]

*Catena 21*

At this point in the *Opus nonaginta dierum*, Ockham was defending the idea that things of fact (*quae facti sunt*) can truly belong (*conuenire*) to corporations.[95]

1. *C. 12 q. 2 c. 49*
2. *C. 25 q. 1 c. 1*
3. D. 15 c. 3
4. D. 15 c. 2
5. *X 4.1.1*
6. X 1.1.2

Ockham argued by means of a *reductio ad absurdum*: if things of fact cannot belong to an Order, then the same would be true of all other corporate bodies, from colleges to general councils and the congregation of the faithful, to cities and kingdoms even. He then cited scriptural examples of groups doing factual things, such as praying (Lc. 1:10) or waiting for someone (Lc. 1:21). He then quoted from the *Decretum*, noting that a church ought neither lose its own things nor rapaciously take possession of other peoples' things (C. 12 q. 2 c. 49). The universal Church has approved constitutions of synods, as the remaining *capitula* references attest. All of these are examples of corporate bodies "factually" performing an action.

Although Michael cited D. 15 c. 2 frequently, he did not use it in the same way Ockham did except incidentally: that is, he often used it to point out that the Church "does" things, but he was not trying to show *that* it does things, but *what* it does.[96] Much the same should be said for earlier uses of D. 15 c. 3.[97] Ockham might have first learnt the importance of these passages, which affirm the validity of the first four ecumenical councils, but he derived a different lesson from them than did the other Michaelists.

Overall, this group of references was unique to Ockham, and I cannot trace a connection through the *Gloss*. Perhaps another source can explain these references, but this seems further evidence that Ockham studied some canon law for himself.

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[94] It is also worth noting in passing that the gloss *Priusquam* directs the reader to D. 56 c. 7 and C. 16 q. 7 c. 38, which were deployed (only) by Michael when he was making the similar point that people should not be deprived of their property or power to use their property without fault; see above, p. 107.

[95] *OND* 62.225–256 (2:568–69).

[96] See *App. maior*, 248–49, 367–68, 400, 408, *App. maior*, 409; *App. mon.*, 627 and 861; and *App. minor*, 450, which Ockham quoted at *OND* 122.8–32 (2:831–32). See also *3 opp.*, 491–92.

[97] See *App. maior*, 232; *App. mon.*, 853; *3 opp.*, 492, 497, and 511; and *Alleg.*, 536.

*Catena 25*

These references occur in the seventy-first chapter where Ockham explains what the word *simplex* and its cognates usually mean.[98] It is one of the few places in the *Opus nonaginta dierum* where Ockham tells us how philosophers think about such things, particularly in natural philosophy and logic.

1. *C. 6 q. 1 c. 13*
2. *X 3.19.8*
3. *X 1.3.20*
4. *D. 2 de cons. c. 3*
5. X 1.7.2
6. X 5.7.12
7. *D. 36 d.a.c. 1*
8. gl. D. 39 c. 1 (simplex est) (cf.)
9. *X 4.6.4*
10. *X 5.39.29*

Unlike in philosophy, in theology, law, and everyday speech (*in vulgari locutione*), *simplicitas* is usually meant in a sense opposite to deceitfulness (*dolositati*), as suggested by Scripture and C. 6 q. 1 c. 13, or taken for stupidity and ignorance, or indiscretion or inexperience, in which case the laws tells us that the simple ought to be spared (X 3.19.8; X 1.3.20; D. 2 de cons. c. 3; X 1.7.2; X 5.7.12; D. 36 d.a.c. 1; *Glos. ord.* ad D. 39 c. 1, s.v. "simplex est"). *Simplex* may also be opposed to "solemn," as in a simple, not solemn vow (X 4.6.4). Using everyday speech one may also call a priest "simple," which merely means that the priest lacks greater dignity than (mere) priesthood, much like a simple soldier is but a soldier and a simple monk is but a monk; Ockham then suggested we compare what is said in X 5.39.29.

What stands out most in this section is how many of the *capitula* Ockham quoted from are unique to him. In fact, when Ockham wrote that *simplicitas* must be spared: "et sic dicunt iura quod parcendum est simplicitati, ut habetur X 3.19.8," it is the gloss *Simplicitati* that we must look at:

> *Simplicitati:* Cui parcendum est: supra X 1.3.20 et Nov. 74.9; Dig. 2.5.2; Dig. 2.13.-1.5; et Dig. 2.1.7.4; D. 86 c. 24 et X 1.7.2.…[99]

In other words, Ockham ignored the many references to Roman law and then went on to quote from the two passages of the *Decretales* referred to by this gloss.[100]

*Cum ex iniuncto* (X 5.7.12) can perhaps be explained in a more roundabout way. As we have seen, Ockham quoted from the *Allegationes religiosorum uirorum* in the opening chapter of the *Opus nonaginta dierum*, which included

[98] *OND* 71.40–85 (2:594–95).

[99] "*Innocence:* Which must be spared: above X 1.3.20 and Nov. 74.9; Dig. 2.5.2; Dig. 2.13.1.5; and Dig. 2.1.7.4; D. 86 c. 24 and X 1.7.2.…"

[100] Cf. *Glos. ord.* ad X 1.7.2, s.v. "Ex simplicitate": "Simplicitati enim parcendum est: D. 86 c. 24 et X 3.19.8, ubi plures concordantiae sunt ad hoc."

X 5.7.13, and alluded to it again in the same chapter. He also closed his work with two references to X 5.7.13, which is not surprising since the *capitulum* belongs to the title *De haereticis*. Since this title was a fairly popular one among the Michaelists, it is reasonable to suppose that Ockham would have made use of it if were to hand.[101] More tenuously, one gloss quite near to the portion of *Cum ex iniuncto* that Ockham quoted cross-references D. 38 c. 12, which is part of section of the *Decretum* that is meant to show that clerics should have practical, experiential knowledge (DD. 36–40).[102] As the table of canon law references shows, this was also a section of the *Decretum* that Ockham seems to have taken a personal interest in. In any event, these two *capitula* from the *Decretum* are linked through the gloss, and explain why Ockham said that *simplicitas* might refer to inexperience,[103] or be opposed to deceitfulness or mean stupidity.[104]

*Catena 28*

Chapter ninety-one again demonstrates Ockham's use of the early distinctions of the *Decretum*. At this point in *Quia vir*, the pope was explaining that the Michaelists misunderstood *Quo iure*, which, he argued, merely indicated that the *ius agendi* in court was a formula introduced by civil law.[105]

1. gl. D. 1 c. 7 (Ius naturale)
2. D. 1 c. 9
3. D. 1 c. 10
4. D. 8 c. 1 (*Quo iure*)

In his reply Ockham referred several times to *Quo iure*, but only after he deployed these three *capitula* of the first distinction. Unlike his confreres Ockham quoted the gloss *Ius naturale* to show that *ius ciuile* could be taken in a number of different ways: either as what is neither natural law nor the law or nations; as what is not canon law; as the law of the twelve tables; or in contrast to the *ius praetorium*.[106] The point for Ockham was that in the way the Michaelists understood civil law—namely, "pro iure humano"—John's point about *Quo iure* made no sense. There are, after all Old Testament

[101] *Glos. ord.* ad X 5.7.13, s.v. "Apostolicae" refers to X 5.39.29, which may explain its appearance at the end of this *catena*.

[102] *Glos. ord.* ad X 5.7.12, s.v. "Exquirunt": "scilicet subditi a scholasticis: D. 38 c. 12. Bernardus." Cf. *Glos. ord.* ad X 5.7.12, s.v. "Simplicitatem." For the summary grouping of the mentioned distinctions, see the *Casus* to D. 36.

[103] *Glos. ord.* ad D. 36 d.a.c. 1, s.v. "Simplicitatis."

[104] *Glos. ord.* ad D. 39 c. 1, s.v. "Simplex est."

[105] The following is based on *OND* 91.1–128 (2:665–68).

[106] Quoted above, p. 98 n. 163.

examples that make a mockery of the pope's claims.[107] Secondly, Ockham used D. 1 c. 9, which describes what belongs to the *ius gentium* and why it is so called, to show that *dominia* of things are acquired by human law "extra iudicium." He then quoted from D. 1 c. 10, which treats of *ius militare*, to show that other property relations, such as the division of spoils and the prince's portion (*praedae divisio et portio principis*), have been introduced by this (human) *ius*.[108]

From there Ockham moved on to a detailed analysis of *Quo iure*, but since it was a popular choice among the controversialists, there is no need to doubt Ockham's familiarity with its contents.[109]

Clearly much more could be said about Ockham's use of legal sources in the *Opus nonaginta dierum*. I have only surveyed a small selection of the references cited in Offler's critical edition of the text; to do more, however, would require a much longer, and much different, study. Yet I think it should be clear that Ockham not only relied more heavily on canon law sources than Roman law ones, he also studied the texts of the *Corpus iuris canonici* for himself, which does not seem to be the case at all for the *Corpus iuris civilis*.[110]

There are reasons to believe this was a deliberate move on Ockham's part. Two later works, both incomplete, provide a clue. In the prologue to 3.2

[107] Ockham cited 1 Reg. 30:24–25 and Gen. 47:26.

[108] Ockham also mentioned that *praescriptiones* and *usucapiones* were introduced through civil laws, which are dealt with briefly at D. 1 c. 12 (and s.v. "usucapionibus").

[109] For what it is worth, its glosses *Nam iure diuino* and *Possidere* both refer to C. 23 q. 7 c. 1. It is also interesting that when Ockham quoted this part of *QVR* at *Brev.* 3.1.66–73 (4:163), and responded to it in the following chapter, he avoided this argument entirely.

[110] We should note in passing that there are even more "anomalous" references in the *OND* than we have considered so far. The following list comprises the references to canon law that occur in relative isolation within the *OND* and are unattested in the other Michaelist texts; Ockham quoted from many of these directly:

| | | | |
|---|---|---|---|
| D. 10 c. 1 | C. 8 q. 1 c. 12 | D. 5 de pen. c. 2 | X 2.26.17 |
| D. 23 c. 6 | C. 12 q. 2 c. 16 | C. 35 q. 9 c. 8 | X 3.50.1 |
| D. 25 c. 4 | C. 14 q. 1 c. 2 | X 1.19.1 (*cf.*) | X 5.39.29 |
| D. 37 c. 10 | C. 19 q. 3 c. 7 | X 2.2.10 | VI 5.13 reg. 72 (*cf.*) |
| D. 88 c. 6 (*cf.*) | C. 24 q. 3 c. 30 | X 2.2.11 | |

Contrast the equivalent list of Roman law references in the *OND*:

| | | | |
|---|---|---|---|
| Inst. 1.2.2 (*cf.*) | Dig. 1.3.12 (*cf.*) | Dig. 50.17.155.1 (*cf.*) | Cod. 8.33(34).3 (*cf.*) |
| Inst. 3.14.2 (*cf.*) | Dig. 6.1.49 (*cf.*) | Cod. 3.32.2 (*cf.*) | |

What should be obvious is that, unlike many of the *capitula* of canon law, Ockham never actually quoted from or referred to any of these passages explicitly.

LEGEND: (cf.) = not cited directly; *italics* = unique to *OND*; (*cf.*)= not cited directly, unique to *OND*

*Dialogus*, which was possibly written in the early 1340s,[111] the *magister* warns that he does not have all the needed materials for a five-part treatise about the rights of the Roman Empire (*de iuribus romani imperatorii* [sic]). He only has access to the Bible, the *Decretum*, and the *Decretales*, while a proper work would also require access to the books of Roman law, moral philosophy, and histories of the Roman people, the emperors, the popes, and other peoples.[112] If we may take the master's poverty of sources as indicative of the resources Ockham had available to him in Munich, then the preference for canon law is understandable.

The *Breviloquium* is even more interesting, however. It was probably composed around the same time as the tracts of the third part of the *Dialogus*, but the discrepancy between the use of Roman and canon law is explained somewhat differently. As Ockham saw it, we should judge it suspect if the pope tries to prove his authority only by means of canon law, without also defending his position with Scripture; the same would be true, he added, if the emperor tried to do the same thing through Roman law alone.[113] On the other hand, citing canon law against a pope's claims to supreme *plenitudo potestatis*, or Roman law against similar claims of the emperor, is quite convincing. It is for this reason, he said, that he would adduce the canons of the Fathers very frequently (*saepius*).[114]

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[111] The text is almost impossible to date; John Kilcullen surveyed the possibilities and historiography in the introduction to the recent critical edition of parts 2 and 3.1 of the *Dialogus* (110–13).

[112] 3.2 *Dial.* prol. (229vb–30ra): "Eorum perfecta cognitio que tractanda commemoras ex libris sacre theologie, utriusque iuris canonici videlicet et ciuilis, philosophie moralis, et ex hystoriis romanorum, atque imperatorum, et summorum pontificum, et aliarum gentium, esset patentius extrahenda et solidius munienda: de quibus solummodo bibliam et decretum cum quattuor [*sic*] libris decretalium spem habeo obtinendi. Quare ne forsitan opus imperfectum imo ridiculosum faciamus uidetur consulsius [*sic*] desistendum." I would like to thank one of the anonymous reviewers for reminding me of this passage.

[113] *Brev.* 1.8.7–12 (4:106): "Si enim papa potestatem suam, quam ex iure divino asserit se habere, solummodo per decreta et decretales probare voluerit, respondebitur sibi quod haec probatio in praeiudicium partis tamquam familiaris, nisi scripturis possit muniri divinis, est habenda suspecta, et idem dici poterit imperatori et alteri cuicumque, si solummodo per imperiales leges se contra papam in huiusmodi temptaverit defensare.…" This last point seems related to the complaint in the prologue to 3.2 *Dialogus*.

[114] *Brev.* 1.9.1–18 (4:107–08): "Allegatio sit debilis iudicanda, si papa decretales pro se vel imperator leges civiles pro se adduxerit, tamen illa allegatio fortis est censenda, quae in decretalibus contra papam recipientem ipsas et in legibus contra imperatorem, si illas quae pro se sunt servare voluerit, evidentius est fundata.… Propter quod in sequentibus contra quosdam posteriores vocatos pontifices canones antiquorum patrum saepius allegabo.…"

It is an intriguing suggestion, but it does not map so neatly onto the circumstances surrounding the poverty controversy, for while we might agree that it seems easier to find pro-papal authority ideas in canon law than in Roman law, there is no reason to think that canon law is biased towards any pope's views on property rights. In fact, if the poverty controversy demonstrates anything it is that it was almost impossible for a pope to publish a word about Franciscan poverty without someone complaining that it contradicted earlier decrees. The question remains: if Ockham had had easier access to the texts of Roman law, would his arguments be any different? It seems to me that the repeated complaints that Roman law ideas about *usus* were too narrow suggests that *Breviloquium* is the more significant hint. Ockham thought that the texts which called for explication most were found in canon law, from *Quo iure*, to *Dilectissimis*, to the bulls of Nicholas III, Clement V, and of John XXII himself. Thus, while overly legal understandings were suspect, the Michaelist case would nonetheless be the stronger to the degree it can be shown to be consistent with the texts of canon law. I suppose it must also be mentioned that Ockham's attitude about the sepration of canon and civil law demonstrates best of all how far he was from the mental world of the jurists. It would be inconceivable for jurists to make such a claim.[115]

By way of conclusion, let us look once more at the beginning and the end of the *Opus nonaginta dierum*. What can be said of Ockham's execution of his professed intentions? The bare bones of his claim to provide the whole text of *Quia vir* along with the objections and responses of the *impugnatores* was never really in question. Ockham's prologue makes no direct claim of impersonality, though that seems to be the implication. In the conclusion, however, he is a mere "reciter" of the many opinions of others; his wish was to inspire some hard thinking on the part of the *impugnatus*, and to get him to express his opinion. Ockham then disavowed authorship in the "strong sense"; he would express his own opinions in—God willing—an "excellent" future work.[116] Yet it should be clear by now that Ockham was much more

[115] One might profitably consider the discussion of the first book of the *Dialogus* as to whether canonists (i.e., not jurists) or theologians are best equipped to deal with heresy. See Posthumus Meyjes, "Exponents of Sovereignty," 305–07, and Scott, "Ockham and the Lawyers," for further discussion.

[116] *OND* 124.469–474 (2:857–58): "Impugnati vero exercitare volui inetllectum [*sic*] et sibi occasionem cogitandi ac mentem suam circa omnia exprimendi praebere. Quid vero de omnibus sentiam, in quodam opere super omnes constitutiones istius ab aliis impugnatas, quantum patietur pro tempore isto ingenii mei penuria, exquisito, divina gratia concedente,

of an author than he claimed. There is no doubt that he recycled ideas other Michaelists had already conceived, but he also sharpened them in many cases, and ignored or downplayed others according to the method of proposing objections and solutions to John's arguments. The use of Aquinas in the *Opus nonaginta dierum* is one clear novelty.[117] I believe that his final position on how *usus* could be related to different kinds of rights was also noticeably different in the finer details.

The same is true of his use of legal sources, at least as far as this cursory examination can discern. Ockham was no jurist, and his ability to cite legal precedents to support his argument certainly does not equal that of Bonagratia, who could string together truly enviable lists of *capitula* and *leges*, as we see in both the texts written in his own name and those published under Michael's. Yet Ockham did not merely shorten the *catenae* found in other Michaelist texts. He undertook to read up on canon law for himself, and he cut out Roman law references that he could have easily put to use. I suggested that this was a deliberate decision on his part, but it is conceivable that he did not have easy access to Roman law collections when he was writing, and so left out references he saw in other texts simply because he was uncertain of their significance. Or perhaps he had not had the time to do work *in originalibus* for both canon and Roman law and had to focus his energies in one direction. It is hard to be certain about the *why* but there can be no doubt *that* his work as a whole displays a strong preference for canon law over its Roman counterpart.

One final issue: Does the *Opus nonaginta dierum* deserve the label "legalistic"?[118] If we mean this in the sense of being overly reliant on legal definitions and strict adherence to the written rules of the law, then I would deny it that label. There is no question that Ockham relied heavily on definitions in the opening chapters of the *Opus nonaginta dierum*, but the poverty controversy itself relied heavily on definitions throughout its history. It is not much of a stretch to characterize the whole controversy, from the 1250s on at the very least, as a demonstration of that maxim, "omnis definitio in iure periculosa

explicare curabo." Brett, *Liberty, Right and Nature*, 56–57 n. 23, uses the phrase "in a strong sense."

[117] Notably *OND* 5.207–289 (1:350–53) (*passim*); 9.437–476 (2:391–92); 9.922–927 (2:404); 23.163–327 (2:472–76); 88.281–286 (2:660); 95.242–275 (2:722).

[118] Shogimen, "Relationship," used the term frequently in a seemingly pejorative way; he denied it of the *Opus nonaginta dierum* (416). However, even discounting the fact that an official appeal such as the the *Appellatio maior* is a different genre from Ockham's treatise, he misrepresented Michael's (legalistic) position; cf., e.g., *App. maior*, 253 and 256 (Shogimen cited the second passage).

est."[119] In its final stage, after the segregation of the so-called spirituals from the mainstream community and the doctrinal (as it were) suppression of the spirituals' version of Franciscan poverty, the problem of Franciscan poverty turned on the precise meaning of three or four difficult, and often related, terms: *ius*, *dominium*, *proprietas*, and *usus*. To defend either the view that *ius* and *usus* had to be connected in at least some cases or the view that they were not necessarily connected at all one had to provide useful, working definitions of these terms.

John XXII, not unjustly, relied heavily on a limited definition of *usus* to make his point, but did not analyse the other terms very carefully. The Michaelists wrote at far greater length, and parsed these terms more carefully. A case could be made that Ockham did so more carefully than the rest, though he had the advantage of writing last. When Ockham had the chance, much like Francis before him, he would note that a certain term could be used in many different ways depending on which context was in play. Few of these were 'legal' definitions; in fact, it was often the goal of the Michaelists to show that it was a mistake to insist that a word had only one relevant meaning. There were different sorts of *iura*, for example, and Ockham did not claim that Franciscans had none of them, only that the holder of *usus* did not necessarily have "a (legal) use": *ius* (*positiuum*), *dominium*, and *proprietas* meant one had recourse to the courts, *usus* not necessarily so. Ockham and the poverty controversy in general are often, and with good reason, singled out for their role in the long history of individual rights. But it seems to me the most significant lesson we could draw from this text has less to do with the inviolability or sanctity of these rights, and more to do with how much the justice of the established political order, or *ius ciuile*, has in common with the ethics of one's actions. A natural right of using in a time of extreme need is a right that deserves recognition and protection. But Ockham was defending a vision of society where it was possible for those who lacked resources to live and act justly even if they lacked the power to defend themselves before the law. The society Ockham was defending was not one of rights-based individualism; while he did not downplay their importance, neither did he exaggerate their role. His society instead was bound by ties of charity and fraternalism. It should be possible for people to live, he thought, even if they had no rights beyond those that came to the foreground in times of need. Clearly, Ockham was thinking in terms of the members of his own order, but it is doubtful that Ockham would deny

[119] Cf. Dig. 50.17.202. I owe Joseph Goering thanks for reminding me of this point.

the general applicability of these ideals to society at large. Ockham was not alone in this vision of society, of course: it was a distinctly (if not exclusively) Franciscan way of looking at the world. If Ockham's thoughts about property rights should have any wider value beyond his own day, we could do worse than take to heart the idea that not all rights are what they are trumped up to be, and that we should hope—even if we have no right to expect—that we live in a society where those who lack rights and resources stand a chance, *ex gratia*, of being helped by those who do.

APPENDIX A

# THE FOURFOLD COMMUNITY OF GOODS: BONAVENTURE AND MICHAEL

One of the striking features of Michael of Cesena's *Appellatio maior* is his adoption of Bonaventure's discussion of what he called the *quadruplex temporalium communitas*. Michael greatly expanded on Bonaventure's use of this idea: what took less than two columns of text in the modern edition of Bonaventure's *Apologia pauperum* occupies over five pages of the *Appellatio maior*.[1] Below I give the text in parallel, using italics to indicate substantive differences; afterwards I note a few points of particular interest.

Prima namque communitas est, quae manat ex iure necessitatis naturae, qua fit, ut omnis res ad naturae sustentationem idonea, quantumcumque sit alicui personae appropriata, illius fiat, qui ea indiget necessitate extrema. Et huic communitati renuntiare non est possibile, pro eo quod manat ex iure naturaliter inserto homini, quia[2] Dei est imago et creatura dignissima, propter quam sunt omnia mundana.

Prima namque communitas est quae emanat a iure necessitatis naturae, *quo iure* fit ut omn*i re temporali* ad naturae sustentationem idonea, quantumcumque sit alicui personae appropriata, *ille* qui ea indiget necessitate extrema *licite uti possit ad naturae sustentationem, etiam absque voluntate vel licentia eius cui appropriata erat, quinimmo potest eam licite auferre et violenter ab illo cui est appropriata*.... Et huic communitati *sive iuri* non est possibile renuntiare pro eo quod manat a iure naturaliter inserto homini, *qui*[2] Dei est imago et creatura dignissima, propter quam sunt omnia mundana *creata*.

Secunda communitas est, quae manat ex iure caritatis fraternae, qua fit, ut omnia sint iustorum, *et* communione quadam caritatis quae sunt propria *singulorum* fiant universorum communia, secundum illud Apostoli: *Omnia vestra sunt* [1 Cor. 3:22]. De qua Augustinus super Ioannem homilia sexta, loquens contra haereticos Donatistas:[3] "Ve-

Secunda communitas est quae manat ex iure *divino, quo* fit ut omnia sint iustorum communione quadam *fraternae* caritatis, *ut* quae *prius erant* propria, fiant universorum communia, secundum illud Apostoli [1 Cor. 3:22]. De qua *communitate* Augustinus super Ioannem, homilia 6, loquens contra haereticos Donatistas, *et ponitur*

[1] *Ap.paup.* 10.13–16 (BOO 8:309a–10a); *App. maior*, 335–40.

[2] Bonaventure's text has *quia*, but it seems to me that *qui* would be the better reading.

niant", inquit, "ad catholicam Ecclesiam et nobiscum habeant non solum terram, sed eum 'qui fecit caelum et terram.'" *Et huic communitati renuntiare est omnino illicitum, quia manat ex iure divinitus infuso, per quod est unitas in columba, id est in universali Ecclesia, a qua quidem unitate ac communione nullus potest discedere, servata divina lege, quae tota completur in caritate.*

*C. 23 q. 7 c. 3 dicit*: "Veniant," inquit, "ad catholicam Ecclesiam et nobiscum habeant non solum terram, sed etiam eum qui fecit caelum et terram"…. *Et secundum hoc ius divinum fuerunt apostolis omnia temporalia communia, non quantum ad proprietatem sive dominium iuris civilis et mundani, quae reliquerant, dicentes: "Ecce, nos reliquimus omnia"* [*Mt. 19:27*]*, sed solum quantum ad usum. Ex quo iure etiam emanavit in Ecclesia primitiva communitas credentium et apostolicam vitam sequentium, de qua dicitur Actuum 4, 32.…*

Tertia est communitas, quae manat ex iure civilitatis mundanae, qua fit, ut unius *imperii*, regni, vel civitatis una fiat respublica, vel unius societatis, ut mercatorum vel pugnatorum, commune fiat lucrum vel damnum, vel unius indivisae familiae una sit communis hereditas. Et huic communitati renuntiare est de perfectionis evangelicae necessitate, quia talis communitas personalem includit proprietatem, quae manat ex iure humanitus instituto, *cui etiam annexa sunt quae occasionaliter inducunt difficultatem ad bonum et pronitatem ad malum, ac per hoc perfectioni evangelicae adversantur. Et ideo animae sanctae huiusmodi suadetur dimissio, ut in Psalmo dicitur: "Audi, filia, et vide et inclina aurem tuam et obliviscere populum tuum et domum patris tui"* [*44.11*].

Tertia communitas est quae emanat ex iure civilitatis mundanae, *quo* fit ut unius regni vel civitatis *sive castri vel villae vel unius societatis sive collegii aut universitatis hominum aliquorum* una fiat *communitas et* respublica vel unius indivisae familiae una communis haereditas. *Et* talis communitas includit *etiam personalem* proprietatem *in rebus communibus, emanantem* ex iure humanitus instituto, *nam quamvis res communitatis civilis et mundanae absolute non censeantur esse singulorum, sed sint actu universitatis, quoad proprietatem et dominium, Dig. 1.8.6.1; et Dig. 2.4.10.4.… Ideo cuilibet de tali communitate sive collegio dicitur competere proprium ius personale in rebus communibus illius collegii. Et talis communitas quae* personalem includit proprietatem manantem ex iure humanitus instituto, *nullo modo stat cum perfectione evangelica de qua dixit Christus* [*Mt. 19:21*] …. *Immo,* tali communitati renuntiare est de necessitate *volenti* perfectionem evangelicam *adipisci*.

Quarta communitas est, quae manat ex iure dotationis ecclesiae, qua fit, ut omnia bona, quae conferuntur ecclesiis, Domino dedicentur ad communem sustentationem ministrorum suorum et pauperum. Et haec communitas est in omnibus ecclesiis collegiatis habentibus possessiones. Et huic communitati renuntiare non est perfectioni necessariam, *quia teneri potest salva perfectione, sicut apparet in praelatis et Religiosis perfectis et sanctis;* quia talis communitas ex

Quarta communitas est *ecclesiastica*, quae *emanavit* ex iure *ecclesiastico ratione* dotationis Ecclesiae *introducto, scilicet postquam fuit Ecclesia dotata a principibus christianis. Et* haec communitas includit *quasi* proprietatem, non personalem sed collegialem, *non civilem et mundanam sed ecclesiasticam.… Ex hoc iure ecclesiastico bona Ecclesiae divisa sunt per ecclesias diversorum locorum auctoritate summorum pontificum, et ecclesiae limitate et episcopis*

iure manat divinitus ordinato, "ut de altari vivat qui altari deservit" [1 Cor. 9:13], et illis sint omnia communia, quibus est "cor unum et anima una" [Act. 4:32], unus pater spiritualis et una norma vivendi. Huic tamen communitati renuntiare non est perfectioni contrarium, quin potius facit ad perfectionis evangelicae cumulum, pro eo videlicet, quod talis communitas, quamquam manet ex iure divino, manat etiam ex humano, et quia non solum est spiritualis, verum etiam temporalis, et quia, licet in ea excludatur personalis proprietas, includitur tamen proprietas collegialis, cuius etiam quaelibet persona de collegio particeps esse dignoscitur *non solum quantum ad usum, verum etiam quantum ad dominium,* dum unusquisque ipso iure actionem habet ad res ecclesiae suae recuperandas et exceptionem ad defendendas; quod vere declarat, dominii rerum ipsarum agentem vel excipientem aliqualiter esse participem.

*et aliis praelatis in ecclesia concessa est administratio. Et haec communitas est etiam in omnibus ecclesiis collegiatis et regularibus habentibus domos et praedia rustica et urbana et possessiones ac alia bona in communi sive ad sufficientiam vitae, ut habent monasteria abundantia, sive habeant aliqua sed non ad sufficientiam, unde et mendicare compellantur, ut Praedicatores. Et quia pro ipsis domibus, praediis, possessionibus et bonis quae in communi habent,* ipsi communitati datur actio et exceptio in iudicio, dicuntur in bonis ipsius communitatis esse, Dig. 41.1.52. *Ideo talis communitas dicitur habere quasi proprietatem et dominium utile.…* Nec ad perfectionem evangelicam servandam necesse est renuntiare huisumodi communitati, potest tamen renuntiare tali communitati volens ad perfectionis evangelicae celsitudinem pervenire, quia talis communitas emanat etiam ex iure humano ⟨et⟩ *ecclesiastico. Unde etiam talis communitas est temporalis,* quia licet in ea excludatur personalis proprietas, includitur tamen in ea quasi quaedam collegialis proprietas cuius quilibet de collegio *quodammodo* particeps esse dignoscitur, dum unusquisque clericus ecclesiae collegiatae habet actionem ad res ecclesiae suae recuperandas et exceptionem ad defendendas.

Bonaventure employed this quadruple distinction to show how it was that the Church could "truly" possess temporal goods equally by divine and human law (*ius*). As Lambertini noted, these *communitates* are distinguished by two basic features: what *ius* they are based on, and whether they can be renounced.[4] According to Bonaventure, it is by means of the *communitas* that derives from the *ius necessitatis naturae* that previously appropriated things comes to belong to the one who needs it. This was of course a standard view, as was the idea that one could not avoid this type of joint possession, even if it only had practical importance in extreme circumstances.

The second community is the one by which all things can be said to belong to the just, for by the fellowship of charity, what belongs to one person comes

[4] Lambertini, *Apologia e crescita*, 94; see generally his discussion on 94–97.

to belong to the entire group. Since this type of joint possession derives from a divinely infused *ius*, it too is irrenouncible.

The third community corresponds to civil society. This sort of community *must* be renounced for the sake of evangelical perfection *because* it includes personal ownership, which is based on positive human law, and which occasionally makes it harder to do good than ill.

The fourth community describes the ecclesiastical society. It is by this community, which derives *ex iure dotationis ecclesiae*, that everything conferred upon the Church is dedicated to God for the sake of sustaining his ministers and his faithful poor. This community exists in all churches which have possessions of their own. The perfect do not need to renounce this community since it is based on divinely instituted *ius*; but they can renounce it if they wish. It is, after all, both a spiritual and temporal community: spiritual because it excludes personal ownership, but temporal because it allows collegial ownership. Members of this community thus have both *usus* and *dominium*, which means that they can take action in court to defend or recoup the things of the Church.[5] At the same time, however, the Church cannot be said to have true *dominium*.[6]

Bonaventure did not make great use of this fourfold division; for him it was more of an *ad hoc* device that allowed him to specify better the difference between the first and second *communitates* on the one hand and the third and fourth on the other.[7] Michael made a far more extensive use of this concept, both explicitly and implicitly, and I think evidence of its influence can be detected in the writings of Francis and William as well even though they never employed these terms directly.[8]

The most obvious difference between the two texts is the switch from *qua* to *quo* in each case (except the fourth, but the effect is the same). Michael chose to emphasize the role *ius* played in determining these *communitates*. Now it is the *ius* that directly produces the result.

The first *communitas* is pretty much the same as it is in Bonaventure. The biggest difference lies in the fact that Michael avoided Bonaventure's wording where it is said that in the case of extreme need things come to belong to (*illius fiat*) who needs them. Michael instead put the same point

[5] Lambertini, *Apologia e crescita*, 96, has stressed that Bonaventure thought the right (*diritto*) of recouping or defending goods is a true sign of *dominium* over a thing.

[6] *Ap.paup.* 11.4 (BOO 8:312a); noted by Lambertini, *Apologia e crescita*, 97.

[7] Ibid., 95.

[8] Horst, *Evangelische Armut*, 88–89, briefly discussed Michael's four *Gütergemeinschafen*, but without reference to Bonaventure.

into the language of the Michaelist position. Now the person in need can merely licitly use the things he needs even without the owner's licence to do so; he may do so violently even if it is necessary. This is not theft, Michael assured us; and it is what Nicholas was describing by his use of *ius poli*.[9]

For the second *communitas* Michael also laid stress on *usus* over property rights.[10] Bonaventure chose to avoid both terms, presumably because the "fellowship of charity" has nothing to do with property rights. Michael connected this fellowship with the primitive Church (though I doubt that Bonaventure would have had a problem with this) by linking it to *Dilectissimis*.

Michael kept to the idea that the third *communitas* described the civil order. The *ius civilitatis mundanae* was the means by which one community or *respublica* come to be of a kingdom, city, fellowship, or, he added, college. The key feature remained that such associations had personal ownership, and Michael added a series of references to the *Digest* to highlight the nature of corporate ownership.[11]

The fourth community underwent the most profound change. Michael dropped the references to Acts 4:32 and instead focused on how this *communitas* differed from the primitive Church. At that early date the apostles and their followers did not acquire any estates or possessions in Judea, only their *pretia*, which was for fostering the needy. It was only after the Church came to the Roman princes that the Church was endowed. Michael quoted from C. 12 q. 1 c. 16 to prove his point.[12] By *ius ecclesiasticum* the goods of the Church are divided among the various churches, and these churches can defend their property in court, although they do not have more than restricted ownership (*quasi proprietatem et dominium utile*). It is not full civil ownership or lordship because, unlike that which exists in the third *communitas*, if this *communitas* is dissolved the goods are not divided among its members like a non-ecclesiastical corporation, but reverts to the Church—the *congregatio fidelium*. The Friars Minor renounced this fourth *communitas* along with all personal and collegial ownership, remaining content with the second *communitas* alone.[13] This is why the Franciscan abdication is more perfect than that of the other mendicant orders: it includes an abdication of collegial ownership. Both are perfect, but one is more perfect.

[9] *App. maior*, 336–37.
[10] *App. maior*, 337–38.
[11] *App. maior*, 339.
[12] *App. maior*, 340; the quotation was not noted by the editors.
[13] *App. maior*, 342 (and the first *communitas*).

APPENDIX B

# A STRUCTURAL ANALYSIS OF THE MICHAELIST TRACTS ON EVANGELICAL POVERTY

The texts in the table below are all closely interrelated because of how they quote one another. Using these cues, it is easy to build a table that allows us to see at a glance how the different texts responded to the same substantial problems. I include it here in the hopes that it proves useful to others.

A word about the organization is in order. With the exception of Michael's two longer appeals, the text that is responsible for the organization of all the others is the *Appellatio minor*. The *Appellatio maior* is naturally laid out along the same lines as its shorter counterpart; both deal chronologically and mostly *ex ordine* with the errors found in *Ad conditorem*, *Cum inter*, and *Quia quorundam*.[1] However, the errors listed in the below table often included several (sub-)errors of their own. The *Appellatio monacensis* follows its own logic, which was to extract only the *principales errores* from John's bulls. Yet as Lambertini noted, these errors are organized along the following lines: the first two errors are Christological in nature, the next eight deal with the apostles, while the eleventh addresses the issue of property in the primitive community of believers, and the twelfth confronts the problem of consumables.[2] Francis and Ockham were systematic in a different way: If the man who called himself Pope John XXII wanted to refute Michael bit-by-bit, then they would do the same, only at greater length.[3] It seems reasonable to assume that William saw the benefits of Francis's paragraph-

[1] Cross-references to these bulls are provided in the notes.

[2] Lambertini, "Francesco d'Ascoli e la polemica," 282. Even within these errors there is a tendency to analyze the error in terms of what Scripture says, then the Fathers, then the determinations of the Church. See Accrocca, "Heretical Pope," 174–79, for a summary account of the twelve errors.

[3] As the table makes clear, Francis did not entirely follow this method, but for reasons that remain unexplained. Some seemingly 'out of place' paragraph numbers are due to repetition on the part of either John or Michael, but not all can be explained that way. It is possible that Francis had intended a more thematic approach but simply gave that up as the far more difficult option.

by-paragraph response (and that of the *Tres oppositiones*), but we should not forget that this was not an unheard of procedure to adopt.

Michael's appeals are easily divisible according to the major errors he lists; Ockham's text is divided according to his one hundred and twenty-four sequential quotations of *Quia vir*; Francis's text quotes *Quia vir* in forty-six blocks, but his editor has usefully numbered the paragraphs, which makes it easier to pinpoint parts of his argument. The numbers in the table below refer to these divisions. The version of *Quia vir* found in Gál and Flood was left undivided, so I refer to it by the page numbers of that edition. One final caveat: the thematic method of the *Appellatio monacensis* means that its structure cannot so easily be compared to the *Improbatio* or the *Opus nonaginta dierum*. Therefore, the structural relationship among these three texts is less tidy than the following table may make it seem.

Table B.1: Structural Analysis of Michaelist Tracts on Evangelical Poverty

| *App. maior* | *App. minor* | *QVR* | *App. mon.* | *Improbatio* | *OND* |
|---|---|---|---|---|---|
| | | *introductory comments*[4] | | | prol.–2 |
| *ACC*[2] 1st | 1st[5] | 555–56 | 12th | 4–8 | 3 |
| | | 556–57 | | 101, 108–109 | 4 |
| | | 557–58 | 5th | 122–124 | 5 |
| | | 558–59 | | 135, 144–147 | 6 |
| | | 559–60 | | 168 | 7 |
| | | 560 | | 168, 175, 44 | 8 |
| | | 560–61 | 11th | 56–60 | 9 |
| | | 561–64[6] | | 184–189 | 10–13 |
| | | 564 | | 252–253, 266 | 14 |
| | | 564–65 | | 271–272 | 15 |
| | | 565 | | 305 | 16 |
| | | 565–66 | | 311, 340 | 17 |
| | | 566 | 5th | 372 | 18 |
| | | 566–67[7] | | — | 19 |
| | | 567–68 | | 391–392 | 20 |

(*Continued on next page*)

[4] *QVR* § 2 quotes *App. minor*, 431–32. Note that references to a §-number refer to Ockham's division of the text.

[5] Quotes: *ACC*[2] 85–88 (236), 96–98 (237).

[6] § 11 quotes *App. minor*, 432.

[7] Cf. *App. minor*, 433 (perhaps 435 as well).

| *App. maior* | *App. minor* | *QVR* | *App. mon.* | *Improbatio* | *OND* |
|---|---|---|---|---|---|
| | | 568[8] | | — | 21 |
| | | 568 | | 413 | 22 |
| *QQM* 1st | | 568 | | — | 23 |
| | | 568 | 6th | 414–415 | 24 |
| | | 569[9] | | 463–465 | 25–26 |
| | | 569–70 | | 472–475 | 27 |
| | | 570–71 | | 475, 499 | 28 |
| | | 571 | | — | 29 |
| | | 571[10] | | 86, 505 | 30 |
| | | 572 | | — | 31 |
| | | 571–73 | | 520–525 | 32 |
| *ACC*² 2nd | 2nd[11] | 573–74[12] | | — | 33 |
| | | 574 | | — | 34 |
| | | 574 | | 559 | 35 |
| | | 574–75[13] | | — | 36 |
| | | 575 | | 563 | 37 |
| | | 575[14] | | 576–577 | 38–40 |
| | | 575–76 | | 587–589 | 41 |
| | | 576 | | 597–598 | 42–43 |
| | | 576–77[15] | | 628 | 44–45 |
| | | 577[16] | | 636–637 | 46–47 |
| | | 577–78[17] | | 646–652 | 48–52 |
| | | 578–79[18] | | 668–671 | 53–55 |
| | | 579 | | 683–684 | 56 |
| | | 579–80[19] | | 696–699 | 57–58 |
| *ACC*² 3rd | 3rd[20] | 580[21] | | 711–713 | 59 |

(*Continued on next page*)

[8] Cf. *App. minor*, 433.
[9] § 25: cf. *App. minor*, 433.
[10] Cf. *App. minor*, 433.
[11] Quotes: *ACC*² 126–138 (239–40), 144–150 (240–41).
[12] Quotes *App. minor*, 434, itself quoting *ACC*² 126–138 (239–40), 144–150 (240–41).
[13] Cf. *App. minor*, 435.
[14] § 38: cf. *App. minor*, 433.
[15] § 44: quotes *App. minor*, 435.
[16] § 46: cf. *App. minor*, 435.
[17] § 48: cf. *App. minor*, 436.
[18] § 53: cf. *App. minor*, 436.
[19] § 57: quotes *App. minor*, 436.
[20] Quotes: *ACC*² 188–192 (245), 204–206 (246).
[21] § 59: quotes *ACC*² 188–192 (245), 204–206 (246).

| *App. maior* | *App. minor* | *QVR* | *App. mon.* | *Improbatio* | *OND* |
|---|---|---|---|---|---|
| | | 580–81[22] | | 714–719 | 60–62 |
| | | 581–83[23] | | 748–753 | 63–66 |
| *ACC*² 4th | 4th[24] | 583–84[25] | | 770–774 | 67–70 |
| | | 584–85[26] | | 789–791 | 71–73 |
| *ACC*² 5th | 5th[27] | 585–86[28] | | 800–806 | 74–76 |
| | | 586–87[29] | | 819–824 | 77 |
| | | 587–88[30] | 6th | 833 | 78 |
| | | 588[31] | | — | 79–81 |
| *CIN* 1st | 6th[32] | 588[33] | | — | 82 |
| (*CIN* 2nd)[34] | | 588–90[35] | | — | 83–85 |
| | | 590–94[36] | | 837–859 | 86–92 |
| | | 594–98 | 1st | 906–40 | 93–96 |
| | 7th[37] | 598–600 | | 1036–1044 | 97–99 |
| | | 600 | 4th/5th | 1045–1049 | 100 |
| *QQM* 3rd | | 600 | | 1050 | 101 |
| *QQM* 4th | | 601–02 | 10th | 1051–1064 | 102–103 |
| | | 602–03[38] | 3rd | 1065–1075 | 104–107 |
| | | 605[39] | | 1173–1176 | 108–109 |

(*Continued on next page*)

[22] § 60: cf. *App. minor*, 437 (and perhaps 443).

[23] § 64: cf. *App. minor*, 438; § 65: cf. *App. minor*, 438.

[24] *ACC*² 168–187 (243–54), 208–215 (246–47).

[25] § 67: quotes *App. minor*, 438; § 68: cf. *App. minor*, 439; § 70: cf. *App. minor*, 439.

[26] § 71: quotes *ACC*² 208–214 (246–47); § 72: quotes *App. minor*, 584.

[27] Michael conflated *ACC*² 43–45 (232) and 58–60 (233–34), and quoted 80–84 (235–36) and 251–255 (250–51).

[28] § 74: quotes *App. minor*, 440–41; § 75: quotes *App. minor*, 441; § 76: quotes *ACC*² 44–57 (232–33), which is a fuller quotation of what the *App. minor* gives.

[29] § 77: quotes *ACC*² 60–84 (234–36).

[30] § 78: quotes *App. minor*, 587.

[31] § 80: cf. *App. minor*, 588.

[32] Quotes: *QQM* 261–262 (279), 255–258 (278); *CIN* 14–19 (256); *ACC*² 96–98 (237). General reference to *QN*.

[33] § 82: quotes *App. minor*, 443.

[34] The second error of *CIN* cannot be located within the structure of the other tracts, but I include it here because these errors are related to the sixth error of the *App. minor*.

[35] § 83: quotes *CIN* 14–23 (256–57); § 84: cf. *App. minor*, 443.

[36] § 92: cf. *App. maior*, 239.

[37] Cf. *QQM* 141–148 (269). John greatly expanded this discussion in § 97 ff.

[38] § 106: cf. *App. minor*, 445.

[39] § 108: quotes *App. minor*, 437.

| *App. maior* | *App. minor* | *QVR* | *App. mon.* | *Improbatio* | *OND* |
|---|---|---|---|---|---|
| | | 606[40] | 7th | 1177 | 110 |
| | | 606–07 | | 1202–1208 | 111–114 |
| | | 607–09 | 8th | — | 115–116 |
| | | 609 | 9th | — | 117 |
| | | 609–10[41] | | — | 118–119 |
| *QQM* prol. | 8th[42] | 610–11[43] | | — | 120–121 |
| *QQM* 2[44] | 9th[45] | 612–13[46] | | — | 122–123 |
| | | *concluding remarks* | | | 124 |

[40] § 110: cf. *App. minor*, 437.

[41] § 118: cf. *App. minor*, 443.

[42] Quotes: *QQM* 81–84 (264).

[43] § 120: quotes *App. minor*, 449.

[44] Michael also found heresies in the apparatus of Jesselin de Cassagnes that related to this error.

[45] Cf. *QQM* 13–84 (258–64), 284–345 (280–85).

[46] § 122: quotes *App. minor*, 450; § 123: quotes *QQM* 326–334 (284), 340–345 (285).

APPENDIX C

## A COMPARISON OF LEGAL REFERENCES

The two tables given here should be mostly self-explanatory. They simply indicate how frequently a given *lex* or *capitulum* has been cited, or possibly alluded to, in the named texts. Offler, for one, seems to have edited Ockham's political writings with one eye constantly roving over Ockham's own sizeable oeuvre, while the second continually scanned both the *Corpus iuris civilis* and the *Corpus iuris canonici*, not to mention their respective glosses, and with yet a third eye on the corpus of Michaelist texts. Often enough his suggestions are compelling; however, the table of Roman law citations seems to illustrate my claim that Ockham did not delve deeply into the Roman law sources while composing the *Opus nonaginta dierum*.

The conventions adopted here are simple. An asterisk ("*") marks that a direct reference to or quotation of the *Glossa ordinaria* was made at least once. Thus a "3*" means a certain reference was made three times, and that one or more of those times it was to a gloss. An allusion or conjectured reference to a legal text is marked as such, either to the text itself ("cf.") or to a gloss ("(*)"). In order to make Ockham's "unique" references stand in sharp relief, I have highlighted them by means of a gray bar across that row.

Table C.1: Table of Canon Law References

| Reference | Texts | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | *De paup.* | *App. ACC* | *App. minor* | *App. maior* | *Allegationes* | *QVR* | *App. mon.* | *Improbatio* | *OND* |
| D. 1 d.a.c. 1 | | | | 1 | | | | | |
| D. 1 c. 1 | | | | 1* | | | | 1 | 2* |
| D. 1 c. 2 | | | | | | | | | 1* |

LEGEND: cf. = not directly cited * = reference to gloss (*) = cf. the gloss

(*Continued on next page*)

| Reference | Texts | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | *De paup.* | *App. ACC* | *App. minor* | *App. maior* | *Allegationes* | *QVR* | *App. mon.* | *Improbatio* | *OND* |
| D. 1 c. 5 | | | | | | | | | 3(*)[1] |
| D. 1 d.p.c. 5 | | | | | | | | | 3(*) |
| D. 1 c. 7 | 1 | | | | | | | | 2* |
| D. 1 c. 8 | | | | | | | | | 1 |
| D. 1 c. 9 | | | | | | | | | 1 |
| D. 1 c. 10 | | | | | | | | | 1 |
| D. 3 c. 3 | | | | | | | | | 2 |
| D. 4 c. 2 | | | | 1 | | cf. | | | cf. |
| D. 4 c. 3 | | | | | | | | | 1 |
| D. 5 d.a.c. 1 | 2 | 2 | | 1 | | | | | cf. |
| D. 5 c. 4 | | | | | | | 1 | | |
| D. 5 c. 26 | 1 | | | | | | 1 | | |
| D. 6 d.p.c. 3 | 1 | 1 | | 1 | | | | | 2 |
| D. 8 d.a.c. 1 | | | | 1 | | | | | |
| D. 8 c. 1 | 6 | 2 | | 6 | | 3 | | 3 | 10+ |
| D. 8 c. 2 | | | | | | | | | 1 |
| D. 9 c. 1 | | | | | | | 1 | | |
| D. 9 c. 7 | 1 | 1 | | 3*[2] | | | | | |
| D. 9 c. 8 | | | | 1 | | | 1 | | |
| D. 9 c. 9 | | | | 1 | | | | | |
| D. 10 c. 1 | | | | | | | | | 1 |
| D. 10 c. 8 | | | | | | | | | * |
| D. 11 c. 3 | 1 | | | | | | | | |
| D. 11 c. 4 | | | | | | | | | 1 |
| D. 11 c. 8 | | | | | | | 1 | | |
| D. 12 c. 2 | | | | 1* | | | | | |
| D. 15 c. 1 | | | | 1 | | | | | 1 |
| D. 15 c. 2 | | | 1 | 5 | 2* | | 2 | | 2 |
| D. 15 c. 3 | | | | 1 | 1 | | 1 | | 1 |
| D. 16 c. 4 | | | | 1 | | | | | |
| D. 16 c. 7 | | | | | | | 1 | | |
| D. 17 c. 3 | | | | | 1* | | | | |
| D. 19 c. 1 | | 1 | | 6 | | cf. | 4 | | cf. |

LEGEND: cf. = not directly cited * = reference to gloss (*) = cf. the gloss

(*Continued on next page*)

[1] Offler suggested D. 1 cc. 3–5 for *OND* 2.146–149 (1:302), but as 3.206–207 (1:316) and 106.398–400 (2:780) show, Ockham was probably only really thinking of D. 1 d.p.c. 5 (and perhaps this *capitulum*). The *Gloss* seems appropriate, too, so I mention it as well.

[2] One reference (G&F, 329) was unidentified, perhaps because Michael wrote "Si ad Scripturam" rather than "Si ad Scripturas."

| Reference | Texts | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | *De paup.* | *App. ACC* | *App. minor* | *App. maior* | *Allegationes* | *QVR* | *App. mon.* | *Improbatio* | *OND* |
| D. 19 c. 2 | | | | 1 | | | | | |
| D. 19 c. 5 | 1 | | | 1 | | | 1 | | |
| D. 19 c. 7 | 1 | | | 2 | | | 1 | | |
| D. 19 d.p.c. 7 | | | | 3 | 1 | | | | |
| D. 19 d.p.c. 8 | | | | 3 | | | | | |
| D. 19 c. 9 | | | 2 | 2 | 3* | | 2* | | 2* |
| D. 20 d.a.c. 1 | | | 1 | 3 | | | | | 1* |
| D. 20 c. 1 | 1 | | | 1 | | | 2 | | |
| D. 20 c. 3 | | | | | | | 1 | | |
| D. 21 d.a.c. 1 | | | | 3 | | | | | |
| D. 21 c. 1 | | | | | | | 1 | | |
| D. 21 c. 2 | 1* | | | 2 | | | 2 | | |
| D. 21 c. 3 | | 1 | | | | | | | |
| D. 22 c. 1 | | 1 | | | | | | | 1 |
| D. 22 c. 6 | | | | | | | | | * |
| D. 23 c. 1 | | | | | | | 1 | | |
| D. 23 c. 2 | | | | 1 | | | 1 | | 2 |
| D. 23 c. 6 | | | | | | | | | 1* |
| D. 24 c. 5 | | | | 1 | | | | | |
| D. 25 c. 4 | | | | | | | | | 1 |
| D. 30 c. 15 | | | | 1 | | | | | |
| D. 30 c. 16 | | | | | | | | | 1 |
| D. 35 c. 8 | 1[3] | 1 | | 1 | | | | | |
| D. 36 d.a.c. 1 | | | | | | | | | 1 |
| D. 37 c. 10 | | | | | | | | | 1 |
| D. 37 c. 14 | | | | 2 | | | 1 | | 4 |
| D. 38 c. 1 | | | | | | | | | (*) |
| D. 39 c. 1 | | | | | | | | | 1* |
| D. 40 c. 6 | | | | 2 | 3* | | 1 | | 1* |
| D. 41 | | | 1[4] | | | | | | |
| D. 41 c. 1 | | | | 1 | | | | | 1 |
| D. 41 c. 4 | | | | 1 | | | | | |
| D. 47 c. 8 | 1 | | | 1 | | | | | 2(*) |
| D. 47 c. 9 | | 1 | | | | | | | |
| D. 47 c. 10 | | 1 | | | | | | | |

LEGEND: cf. = not directly cited * = reference to gloss (*) = cf. the gloss

(*Continued on next page*)

[3] Wrongly listed as c. 7 in Oliger, "Tractatus de paupertate," 503 n. 3.

[4] Michael's point (*App. minor*, 435) was that Augustine and D. 41 generally support the notion that food is used (the first four *capitula* derive from Augustine).

| Reference | Texts | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | *De paup.* | *App. ACC* | *App. minor* | *App. maior* | *Allegationes* | *QVR* | *App. mon.* | *Improbatio* | *OND* |
| D. 50 c. 53 | 1* | | | 2 | | | | | |
| D. 50 c. 54 | | | | 1 | | | | | |
| D. 54 c. 22 | | | | 1 | | | | | |
| D. 54 c. 23 | | | | 1 | | | 1 | | |
| D. 56 c. 7 | | | | | | | 1 | | |
| D. 61 d.p.c. 8 | | | | | | | 1 | | |
| D. 61 c. 9 | | | | | | | 1* | | |
| D. 61 c. 10 | | | | 1 | | | | | |
| D. 63 c. 5 | | | | 2 | | | | | |
| D. 63 c. 33 | | | | | | | | | cf. |
| D. 63 c. 35 | | | | | 1* | | | | |
| D. 68 c. 5 | | | | | | | 1 | | |
| D. 68 c. 6 | | | | 1 | | | 2 | | |
| D. 79 c. 1 | | | | 1 | | | | | |
| D. 79 c. 9 | | | | 2 | | | | | |
| D. 81 c. 15 | 1 | | | | | | | | |
| D. 83 c. 3 | | | | 2 | | | | | 3 |
| D. 83 c. 5 | | | | 2 | | | | | |
| D. 86 c. 3 | | | | 2 | | | | | 1 |
| D. 86 c. 6 | | | | | | | 1 | | |
| D. 87 c. 2 | | 1 | | | | | | | |
| D. 88 c. 6 | | | | | | | | | cf. |
| D. 88 c. 11 | | | | | | 2 | 2 | 3 | 3 |
| D. 93 c. 24 | | | | | 1 | | 1 | | |
| D. 95 c. 6 | | | | | 1[5] | | | | |
| C. 1 q. 1 c. 2 | | | | | | | 1 | | |
| C. 1 q. 1 c. 21 | | | | | | | 1 | | 2 |
| C. 1 q. 1 c. 24 | | | | | | | | | 1 |
| C. 1 q. 1 d.a.c. 25 | | | | | | | | | cf. |
| C. 1 q. 1 d.a.c. 40 | | | | | | | | | cf.[6] |
| C. 1 q. 1 c. 41 | | | | 2 | | | 1 | | |
| C. 1 q. 2 c. 6 | | | | | | | | | (*) |
| C. 1 q. 2 d.p.c. 7 | | | | 2 | | | | | |

LEGEND: cf. = not directly cited * = reference to gloss (*) = cf. the gloss

(*Continued on next page*)

[5] G&F, 535: "… quia licet legibus sit solutus, tamen secundum iura agere debet, ff. [1.3] *De legibus*, l. [31] *Princeps*; et C. [1.14] *De legibus*, l. [4] *Digna vox*; et 93 D. [?] *Ecce*, et ibi notatur." The reference is mistaken; of the many *capitula* that begin with "ecce," D. 95 c. 6 is the closest, but not satisfactory.

[6] It is very unlikely Ockham was citing this even allusively; see the discussion on p. 305.

| Reference | Texts | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | *De paup.* | *App. ACC* | *App. minor* | *App. maior* | *Allegationes* | *QVR* | *App. mon.* | *Improbatio* | *OND* |
| C. 1 q. 2 c. 8 | | | | | | | 1 | | |
| C. 1 q. 2 c. 9 | | | | | | | 2 | | 1 |
| C. 1 q. 3 c. 6 | | | | | | | | 1 | 1 |
| C. 1 q. 3 c. 7 | | | | | | | 1 | | |
| C. 1 q. 3 c. 9 | | | | | | | | | 1 |
| C. 1 q. 7 d.p.c. 5 | | | | | | | 1 | | |
| C. 1 q. 7 c. 7 | | | | 1 | | | 1 | | |
| C. 2 q. 6 c. 2 | | | | | | | 1 | | |
| C. 2 q. 6 c. 9 | | | | | | | | | 1[7] |
| C. 2 q. 6 c. 29 | | 1 | | | 2 | | | | |
| C. 2 q. 6 c. 31 | | | | | | | | | cf. |
| C. 2 q. 7 c. 8 | | | | 1 | | | 1* | | |
| C. 2 q. 7 c. 13 | | | | 1 | | | | | |
| C. 2 q. 7 c. 51 | | | 1 | | | | | | |
| C. 2 q. 7 c. 55 | | | | 1 | | | | | |
| C. 3 q. 1 c. 1 | | | | | | | | | 1 |
| C. 3 q. 2 c. 4 | | | | | | | | | 1 |
| C. 3 q. 6 c. 10 | | | | | 1 | | | | |
| C. 3 q. 7 d.a.c. 1 | | | | | | | 2[8] | | |
| C. 4 q. 4 c. 1 | | | | | 1 | | 1 | | |
| C. 5 q. 3 d.a.c. 1 | | | | | | | 1* | | |
| C. 6 q. 1 c. 13 | | | | | | | | | 1 |
| C. 6 q. 1 c. 21 | | | | | | | | | 1 |
| C. 6 q. 3 c. 1 | | | | | | | | | 1 |
| C. 7 q. 1 c. 5 | | | | | 2 | | | | |
| C. 7 q. 1 c. 6 | | 1 | | 1 | 1 | | | | |
| C. 7 q. 1 c. 8 | 1 | | | | | | | | |
| C. 7 q. 1 c. 41 | | | | | | | 2 | | |
| C. 8 q. 1 c. 9 | | | | | | | | | 4 |
| C. 8 q. 1 c. 11 | | | | | | | | | 1 |
| C. 8 q. 1 c. 12 | | | | | | | | | 1 |
| C. 8 q. 4 c. 1 | | | 1 | 1 | | | 3 | | |
| C. 9 q. 2 c. 1 | | | | | 1 | | | | |
| C. 9 q. 3 c. 9 | | | | | 1 | | | | |

LEGEND: cf. = not directly cited * = reference to gloss (*) = cf. the gloss

(*Continued on next page*)

[7] Cited on G&F, 941. As Offler noted (OPol 1:294), this section of the *Opus nonaginta dierum* is dependent on this letter of 'Nicholas the Minorite,' sometimes known as *Quoniam omnis humana sententia*.

[8] Cited twice in two different glosses to C. 24 q. 1 d.a.c. 1 (s.vv. "Quod autem" and "Qui uero"), though in the second case, Michael's text reads 3 q. 7. See, for both, *App. mon.*, 854.

| Reference | Texts | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | *De paup.* | *App. ACC* | *App. minor* | *App. maior* | *Allegationes* | *QVR* | *App. mon.* | *Improbatio* | *OND* |
| C. 9 q. 3 c. 10 | | | | | 1 | | | | |
| C. 9 q. 3 c. 13 | | | | | 1 | | | | |
| C. 9 q. 3 c. 14 | | | | | 1 | | | | |
| C. 9 q. 3 c. 15 | | | | | 1 | | | | |
| C. 9 q. 3 c. 17 | | | | | 2 | | | | |
| C. 9 q. 3 c. 21 | | | | | 1 | | | | |
| C. 10 q. 2 c. 2 | | | | | | | | | 1[9] |
| C. 10 q. 3 c. 7 | | | | | | | | | 1 |
| C. 11 q. 1 d.a.c. 1 | | | | | | | | | (*) |
| C. 11 q. 1 c. 49 | | | | | 1 | | | | |
| C. 11 q. 3 c. 1 | | | | | | | | | cf. |
| C. 11 q. 3 c. 100 | | | | | | | | | 1 |
| C. 12 q. 1 c. 2 | 2* | 2 | 3 | 10+* | | 10 | 6 | 10+ | 10+* |
| C. 12 q. 1 c. 5 | | | | 2 | | | | | 1* |
| C. 12 q. 1 c. 7 | | | | 2 | | | 2 | | 1 |
| C. 12 q. 1 c. 8 | | | | | | | 6 | | 2 |
| C. 12 q. 1 c. 9 | | | 1 | 4 | | 1 | 6 | 1 | 2 |
| C. 12 q. 1 c. 10 | | | 1 | 1 | | 1 | 3 | 1 | 1 |
| C. 12 q. 1 c. 11 | 2* | 1* | 1 | 6* | | | 7* | 1 | 1 |
| C. 12 q. 1 c. 12 | | | 1 | 1 | | | 1 | | |
| C. 12 q. 1 c. 13 | | 1 | | 1 | | | 1 | | 1 |
| C. 12 q. 1 c. 15 | | | | 2 | | 2 | 2 | 5 | 4 |
| C. 12 q. 1 c. 16 | | 4 | | 4 | | | 4* | | 1* |
| C. 12 q. 1 c. 17 | 1 | | 1 | 4 | | 1 | | 2 | 1 |
| C. 12 q. 1 c. 19 | | | | | | | 1 | | |
| C. 12 q. 1 c. 21 | | | | | | | | | 1 |
| C. 12 q. 1 c. 22 | | 1 | | 2 | | | | | |
| C. 12 q. 1 c. 23 | | 1 | | 1 | | | | | |
| C. 12 q. 1 c. 24 | | 1 | | 1 | | | | | |
| C. 12 q. 1 c. 25 | | | | | | | 1 | | (*) |
| C. 12 q. 1 d.p.c. 25 | | | | | | | 1 | | |
| C. 12 q. 1 c. 26 | 1 | 1 | | 3 | | | 1 | | cf. |

LEGEND: cf. = not directly cited * = reference to gloss (*) = cf. the gloss

(*Continued on next page*)

[9] At *OND* 77.412–413 (2:633–34), Ockham writes: "et x, q. ii, c. *Si oeconomus*," which is § 11 of the second *capitulum*, but then goes on to quote from what our modern edition calls *capitulum* 3. The portion that Ockham quoted comes originally from Cod. 1.2.14.9; as the *Correctores Romani* noted, some of the older mss. counted this *palea* as part of *capitulum* 2 and gave the remainder of the *Code* passage as well (CICan., 1:619, in *notationes correctorum*). Apparently he had access to one of the mss. since his quotation includes this later portion as well. Offler listed the reference as C. 10 q. 2 c. 3 on OPol 2:634.

| Reference | Texts | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | *De paup.* | *App. ACC* | *App. minor* | *App. maior* | *Allegationes* | *QVR* | *App. mon.* | *Improbatio* | *OND* |
| C. 12 q. 1 d.p.c. 27 | | | 1 | 2 | | 1 | 1 | | 1 |
| C. 12 q. 1 c. 28 | 2 | | | | | | 1 | | 1 |
| C. 12 q. 2 c. 1 | 1 | 1 | | 2 | | | | | |
| C. 12 q. 2 c. 3 | | 3 | | 3 | | | | | |
| C. 12 q. 2 c. 5 | | 2 | | 2 | | | | | |
| C. 12 q. 2 c. 6 | 1 | 1 | | 2 | | | | | |
| C. 12 q. 2 c. 20 | | 1 | | | | | | | 1 |
| C. 12 q. 2 c. 43 | | | | | 1 | | | | |
| C. 12 q. 2 c. 49 | | | | | | | | | 2 |
| C. 12 q. 2 c. 52 | 1 | | | | | | | | |
| C. 12 q. 2 c. 62 | | | | | | | | | 1[10] |
| C. 12 q. 2 c. 67 | | | | | | | | | 1 |
| C. 12 q. 2 c. 70 | | 1 | | | | | | | 1 |
| C. 12 q. 2 c. 74 | | | | | 1 | | | | |
| C. 12 q. 2 c. 75 | | | | | | | | | 1 |
| C. 12 q. 2 d.p.c. 75 | | | | 1 | | | | | |
| C. 12 q. 3 c. 3 | | 2 | | 4 | | | 1 | | |
| C. 14 q. 1 c. 1 | | | | | | | 1* | | |
| C. 14 q. 1 d.p.c. 1 | | | | | | | 1 | | |
| C. 14 q. 1 c. 2 | | | | | | | | | 2 |
| C. 14 q. 1 c. 3 | | | | 1 | | | | | |
| C. 14 q. 1 c. 9 | | | | 1 | | | | | |
| C. 14 q. 3 c. 1 | | | | | | | | | 2 |
| C. 14 q. 4 c. 11 | | | | | | 1 | | 1 | 2 |
| C. 14 q. 5 c. 13 | | | | | | | 1 | | |
| C. 15 q. 6 c. 2 | | | | | | 1[11] | 2[12] | | 1 |
| C. 15 q. 6 c. 3 | | | | | | | | | 1* |
| C. 15 q. 7 c. 15 | | | | | | | 1 | | |
| C. 15 q. 7 c. 7 | | | | 1 | | | | | |
| C. 16 q. 1 c. 1 | | | | 1 | | | 1 | | |
| C. 16 q. 1 c. 5 | | | | | | | 1 | | |
| C. 16 q. 1 c. 8 | | | | | | | 1 | | |
| C. 16 q. 1 c. 23 | | 1 | | | | | | | |
| C. 16 q. 1 c. 24 | 1 | | 1 | 1 | | 2 | 6 | 5 | 3 |
| C. 16 q. 1 c. 57 | | | | | | 1 | 1 | | 1 |

LEGEND: cf. = not directly cited * = reference to gloss (*) = cf. the gloss

(*Continued on next page*)

[10] Offler found the reference strange and noted (OPol 2:617) that the Lyons edition (1495) emended it to c. 16

[11] Corrected by Offler from "xvi, q. 1, c. *Auctoritate*."

[12] Wrongly listed as "15 q. 6 [c. 2]: *Auctoritate*" at G&F, 777; cf. G&F, 781.

| Reference | Texts | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | *De paup.* | *App. ACC* | *App. minor* | *App. maior* | *Allegationes* | *QVR* | *App. mon.* | *Improbatio* | *OND* |
| C. 16 q. 2 c. 9 | | | | | | | 1 | | |
| C. 16 q. 3 c. 6 | | 1 | | 2 | | | | | |
| C. 16 q. 4 c. 2 | | | | | | | | | 1 |
| C. 16 q. 7 c. 15 | | | | 3 | | | 1[13] | | |
| C. 16 q. 7 c. 38 | | | | | | | 1 | | |
| C. 17 q. 1 c. 3 | | | | | | | | | 1 |
| C. 17 q. 4 d.p.c. 42 | | | | | | | | | 1 |
| C. 17 q. 4 c. 43 | | | | | | | | | 2(*) |
| C. 18 q. 1 c. 1 | | | | | | | 1 | | |
| C. 18 q. 2 c. 22 | | | | | | 1 | 1 | 1 | 1 |
| C. 18 q. 2 c. 24 | | | | | | 1 | | | 1 |
| C. 19 q. 3 c. 7 | | | | | | | | | cf. |
| C. 19 q. 3 c. 9 | 1 | 1 | | 3 | | | 1 | | |
| C. 22 q. 5 c. 11 | 1 | | | | | | | | |
| C. 23 q. 1 c. 2 | | | | | | 1 | 3 | 2 | 2 |
| C. 23 q. 1 c. 3 | | | | | | | | | 2 |
| C. 23 q. 3 c. 2 | | | | | | 2 | 1 | | 2 |
| C. 23 q. 3 c. 5 | | | | | | | | | 1 |
| C. 23 q. 4 c. 10 | | 1 | | | | | | | |
| C. 23 q. 4 c. 12 | | | | 1 | | | | | |
| C. 23 q. 4 c. 27 | | | | | 1 | | 1 | | |
| C. 23 q. 4 c. 28 | | 1 | | | | | | | |
| C. 23 q. 5 c. 8 | | | | | 1 | | 1 | | |
| C. 23 q. 5 c. 9 | | | | | | | 1 | | |
| C. 23 q. 5 d.p.c. 49 | | 1 | | | | | | | |
| C. 23 q. 7 c. 1 | 1 | 1 | | 2 | | 2 | | 1 | 4 |
| C. 23 q. 7 c. 2 | 1 | | | | | | | | |
| C. 23 q. 7 c. 3 | 1 | 1 | 1 | 7 | | | 5 | | |
| C. 24 q. 1 | | | | 1[14] | | | | | |
| C. 24 q. 1 d.a.c. 1 | | | 1 | 2* | | | 2* | | |
| C. 24 q. 1 c. 1 | | | 1 | 1* | 1* | | 3* | | * |
| C. 24 q. 1 c. 2 | | | | 2 | | | 1 | | |
| C. 24 q. 1 c. 3 | | 1 | | | | | | | |
| C. 24 q. 1 d.p.c. 3 | | | | 3 | | | | | |
| C. 24 q. 1 c. 4 | 1 | | | | 1 | | 1 | | |
| C. 24 q. 1 d.p.c. 4 | | | 1 | 5 | 3 | | 1 | | |

LEGEND: cf. = not directly cited * = reference to gloss (*) = cf. the gloss

(*Continued on next page*)

[13] Michael quoted (G&F, 860) a gloss to C. 2 q. 7 c. 8, which reads in part "q. ultima *Sane*," which must be an incomplete reference back to G&F, 858.

[14] This is cited, along with C. 8 q. 4 c. 1, as part of *Glos. ord.* ad D. 19 c. 9, s.v. "Abegerunt."

| Reference | Texts | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | *De paup.* | *App. ACC* | *App. minor* | *App. maior* | *Allegationes* | *QVR* | *App. mon.* | *Improbatio* | *OND* |
| C. 24 q. 1 c. 9 | 1 | 1 | cf. | 3 | | | 3* | | cf. |
| C. 24 q. 1 c. 10 | | | | | 1 | | | | |
| C. 24 q. 1 c. 12 | | | | | | | | | 1*[15] |
| C. 24 q. 1 c. 14 | 2 | 1 | cf. | 3 | | | 2 | | cf. |
| C. 24 q. 1 c. 19 | 1 | | | | | | 1 | | |
| C. 24 q. 1 c. 24 | 1 | | | | | | 1 | | |
| C. 24 q. 1 c. 31 | | | | 3 | 1 | | 2 | | |
| C. 24 q. 1 c. 33 | 1 | 1 | | 3 | | | 1 | | |
| C. 24 q. 1 c. 36 | | | | 2 | | | | | |
| C. 24 q. 1 d.p.c. 37 | | | | 3 | 2 | | 1 | | |
| C. 24 q. 3 c. 26 | | | | | | | 1* | | |
| C. 24 q. 3 c. 27 | 2 | | | 3 | | | 1 | | cf. |
| C. 24 q. 3 c. 28 | | | | | | | 1 | | |
| C. 24 q. 3 c. 29 | | | 1 | 1 | | | 1 | | 2* |
| C. 24 q. 3 c. 30 | | | | | | | | | 1 |
| C. 24 q. 3 c. 31 | | | | | | | | | 2 |
| C. 24 q. 3 c. 33 | | | | 1 | | | | | |
| C. 24 q. 3 d.p.c. 38 | | | | | | | 1 | | |
| C. 24 q. 7 c. 3 | | | | 1 | | | | | |
| C. 25 q. 1 c. 1 | | | | | | | | | 1[16] |
| C. 25 q. 1 c. 3 | | | 1 | 5* | 1* | | 2* | | |
| C. 25 q. 1 c. 4 | | | | 1 | | | | | |
| C. 25 q. 1 c. 5 | | | | 2 | | | | | |
| C. 25 q. 1 c. 6 | | | | 5 | 1 | | 2 | | |
| C. 25 q. 1 c. 7 | | | 1 | 5 | 1 | 1 | 2 | | 1 |
| C. 25 q. 1 c. 8 | | | | | 1 | | 1 | | |
| C. 25 q. 1 c. 9 | | | | | 1 | | 1 | | |
| C. 25 q. 1 c. 10 | | | | | 1 | | | | |
| C. 25 q. 1 d.p.c. 16 | | | | | | | 1 | | |
| C. 25 q. 2 c. 2 | | | | 1 | | | | | |
| C. 25 q. 2 c. 4 | | | 1 | 3 | 1 | 1 | | | 1 |
| C. 25 q. 2 c. 8 | | | | | 1* | | | | |
| C. 25 q. 2 c. 11 | | | | | 1 | | 1 | | |
| C. 25 q. 2 c. 12 | | | | 1 | | | | | |
| C. 25 q. 2 c. 14 | | | | | 1 | | | | |
| C. 25 q. 2 c. 15 | | | | | 1 | | | | |
| C. 25 q. 2 d.p.c. 21 | | | | 1 | | | | | |

LEGEND: cf. = not directly cited * = reference to gloss (*) = cf. the gloss

(*Continued on next page*)

[15] Also cited in *3 opp.*, 483, in a similar group as that found at *OND* 124.74–118 (2:848–49).

[16] Offler marked this as a *confer*, but Ockham cited it explicitly: *OND* 62.243 (2:569).

| Reference | Texts | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | *De paup.* | *App. ACC* | *App. minor* | *App. maior* | *Allegationes* | *QVR* | *App. mon.* | *Improbatio* | *OND* |
| C. 27 q. 1 c. 32 | 1 | 1 | | | | | | | |
| C. 28 q. 1 c. 9 | | | | 1 | | | | | |
| C. 31 q. 1 c. 13 | | | | | | | 2 | | |
| C. 32 q. 3 c. 1 | | | | 1 | | | 1 | | |
| C. 33 q. 2 c. 8 | | | | | | | 1 | | |
| D. 1 de pen. d.p.c. 87 | | | | 1 | | | | | |
| D. 2 de pen. c. 5 | | | | 1 | | | | | |
| D. 5 de pen. c. 2 | | | | | | | | | 1 |
| D. 6 de pen. d.a.c. 1 | | | | 1 | | | | | |
| C. 35 q. 9 d.p.c. 2 | | | | | 1 | | | | |
| C. 35 q. 9 c. 3 | | | | | 1 | | | | |
| C. 35 q. 9 c. 5 | | | | | 2* | | | | |
| C. 35 q. 9 c. 6 | | 1 | | 1 | 1 | | | | |
| C. 35 q. 9 c. 7 | | | | | 1 | | | | 1 |
| C. 35 q. 9 c. 8 | | | | | | | | | 1 |
| D. 1 de cons. c. 8 | | 1 | | 1 | | | | | |
| D. 1 de cons. c. 11 | | | | | | | 1 | | cf. |
| D. 2 de cons. c. 3 | | | | | | | | | 1 |
| D. 2 de cons. c. 73 | | | | | | | | 1[17] | |
| D. 4 de cons. c. 76 | | | | 1 | | | | | |
| D. 5 de cons. c. 26 | | | | 4 | | | 1 | | |
| X 1.1.1 | 1 | | | 4 | | | 2 | | |
| X 1.1.2 | 1 | | | 2 | | | 1 | | 1 |
| X 1.1.3 | | | | 2 | | | | | |
| X 1.2.2 | | | | | | | | | * |
| X 1.2.3 | | | | 1 | | | 1* | | * |
| X 1.3.4 | | | | | 1 | | | | |
| X 1.3.5 | | | | | 1* | | | | |
| X 1.3.8 | | | | | 1 | | | | |
| X 1.3.17 | | | | | 2 | | | | |
| X 1.3.20 | | | | | | | | | 1 |
| X 1.3.25 | | | | | | | 1 | | |
| X 1.3.28 | | | | | 1 | | | | |
| X 1.4.4 | 1 | | | 1 | | | | | cf.[18] |

LEGEND: cf. = not directly cited * = reference to gloss (*) = cf. the gloss

(*Continued on next page*)

[17] Mariani, *Improbatio*, 218 n. 141, suggested Francis might be alluding to Gregory the Great via this passage, or through the mediation of Peter Lombard's *Sentences* (e.g., 4.2[61].8); given Francis's training, the Lombard seems the more likely answer.

[18] It is unlikely Ockham was citing this even allusively; see the discussion on p. 305.

| Reference | Texts | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | *De paup.* | *App. ACC* | *App. minor* | *App. maior* | *Allegationes* | *QVR* | *App. mon.* | *Improbatio* | *OND* |
| X 1.4.9 | | | | | | | | | 1 |
| X 1.5.4 | | | | | | | | | 1* |
| X 1.6.4 | 1 | | | 2 | 1 | | | | |
| X 1.6.20 | | | | | | | | | cf.[19] |
| X 1.6.28 | | | | | 1 | | | | |
| X 1.6.29 | | 1 | | | | | | | |
| X 1.6.34 | | | | | 1 | | | | 2 |
| X 1.6.42 | | | | | 1 | | | | |
| X 1.6.60 | | | | | 1* | | | | |
| X 1.7.2 | 1 | | | | | | 1 | | 1 |
| X 1.7.4 | | | | | 1 | | | | |
| X 1.9.15 | | | | | 1* | | | | |
| X 1.14.4 | | | | | 2 | | | | |
| X 1.15.1 | | 2* | | 2 | | | | | |
| X 1.19.1 | | | | | | | | | cf. |
| X 1.21.4 | | 1 | | | | | | | |
| X 1.28.5 | | | | | 2* | | | | |
| X 1.29.13 | | | | | 1 | | | | |
| X 1.29.15 | | | | | 2* | | | | |
| X 1.29.23 | | | | | 2 | | | | |
| X 1.29.27 | | | | 1 | | | | | |
| X 1.30.4 | | | | | 1 | | | | |
| X 1.31.7 | | | | 1 | | | 1 | | cf. |
| X 1.33.6 | | 1 | | 3 | | cf. | | | cf. |
| X 1.35.3 | | | | | | | 1 | | |
| X 1.43.7 | | | | | 1 | | | | |
| X 2.1.16 | | | | | | 1 | 2 | | 1 |
| X 2.2.2 | 1 | | | | | | | | |
| X 2.2.10 | | | | | | | | | (*) |
| X 2.2.11 | | | | | | | | | (*) |
| X 2.12.4 | 1 | 1 | | 1 | | | | | |
| X 2.13.12 | | | | | | 1 | 2 | | 1 |
| X 2.22.6 | | 2 | | | 1 | | | | |
| X 2.26.7 | | | | 1 | | | | | |
| X 2.26.12 | | 1 | | | | | * | | |
| X 2.26.17 | | | | | | | | | 1 |
| X 2.27.12 | | 1 | | | 1 | | | | |
| X 2.27.24 | | | | | 1 | | | | |

LEGEND: cf. = not directly cited * = reference to gloss (*) = cf. the gloss

(*Continued on next page*)

[19] See the discussion on p. 297.

| Reference | Texts | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | *De paup.* | *App. ACC* | *App. minor* | *App. maior* | *Allegationes* | *QVR* | *App. mon.* | *Improbatio* | *OND* | |
| X 2.28.24 | | | | | 1 | | 2 | | | |
| X 2.28.41 | | | | | | | 1 | | | |
| X 2.28.59 | | | | | 1 | | 1 | | | |
| X 2.28.61 | | | | | 1 | | 1 | | | |
| X 2.30.5 | | | | | 1 | | | | | |
| X 2.30.6 | | | | | 2* | | | | | |
| X 3.1.14 | | | | 1 | | | | | | |
| X 3.1.15 | | | | 1 | | | | | | |
| X 3.2.3 | | | | 1 | | | | | | |
| X 3.2.8 | | | | 1 | | | | | | |
| X 3.2.10 | | | | 3 | | | | | | |
| X 3.5.16 | | | | 1 | | | | | | |
| X 3.5.38 | 1 | | | | | | | | | |
| X 3.8.4 | | | | | 2 | | | | | |
| X 3.15.1 | | | | | | | | | 1(*) | |
| X 3.17.3 | | | | | | | | | (*) | |
| X 3.19.8 | | | | | | | | | 1 | |
| X 3.24.2 | 1 | 1 | | 2 | | | 1 | | 1 | |
| X 3.30.2 | | 1* | | | | | | | | |
| X 3.30.3 | | | | | 1 | | | | | |
| X 3.30.24 | 1 | | | | | | | | | |
| X 3.30.26 | | | | | | | 1 | | | |
| X 3.31.18 | | | | | | | | | cf. | |
| X 3.34.7 | 1 | | | | | | | | | |
| X 3.35.2 | 2 | 1 | | | | | | | | |
| X 3.35.4 | 2 | 1 | | 1 | | | 1 | | | |
| X 3.35.6 | 1 | 1 | 2 | 3 | 1 | 1 | 10+ | 2 | 2 | |
| X 3.37.3 | | | | | 2* | | | | | |
| X 3.38.19 | | | | | | | 1[20] | | | |
| X 3.39.2 | | | | | | | 1 | | | |
| X 3.42.3 | | 1 | | | | | 1* | | 1 | |
| X 3.46.2 | 1 | | | 1 | | | | | cf.[21] | |
| X 3.48.1 | | | | | 1 | | | | | |
| X 3.48.5 | | | | 1[22] | | | | | | |

LEGEND: cf. = not directly cited * = reference to gloss (*) = cf. the gloss

(*Continued on next page*)

[20] Corrected from X 3.24.19 on G&F, 854; it is part of *Glos. ord.* ad C. 24 q. 1 d.a.c. 1, s.v. "Quod autem."

[21] It is unlikely Ockham was citing this even allusively; see the discussion on 305.

[22] G&F, 267 reads: "X. [3. 48] *De ecclesiis aedificandis*, c. [5] *Ad audientiam*, [] 2, in fine; et

| Reference | Texts | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | *De paup.* | *App. ACC* | *App. minor* | *App. maior* | *Allegationes* | *QVR* | *App. mon.* | *Improbatio* | *OND* |
| X 3.50.1 | | | | | | | | | 1 |
| X 4.1.1 | | | | | | | | | 1 |
| X 4.2.13 | | | | 1 | 1 | | | | |
| X 4.6.4 | | | | | | | | | 1 |
| X 4.8.2 | | | | 2* | | | 1 | | |
| X 4.13.11 | | | | | | | | | * |
| X 4.15.1 | | | | | 1 | | | | |
| X 4.20.2 | | | | | | | 2 | | |
| X 5.1.1 | | | | 1 | | | | | |
| X 5.1.9 | | | | 1 | | | | | |
| X 5.4.25 | | | | 1 | | | | | |
| X 5.6.13 | | | | 1 | | | | | |
| X 5.7.1 | | | | 3* | | | | | 1 |
| X 5.7.2 | | | | 1 | | | | | 2 |
| X 5.7.3 | 1 | | | | | | | | |
| X 5.7.5 | | | | 2 | | | | | |
| X 5.7.7 | | | | 2* | | | | | |
| X 5.7.8 | | | | | 1 | | | | |
| X 5.7.9 | 1* | | 1 | 1 | 1 | | 1 | | |
| X 5.7.12 | | | | | | | | | 1 |
| X 5.7.13 | | | 2 | 3 | 1 | | 4 | | 4 |
| X 5.7.15 | | | 1 | 1 | 1 | | | | |
| X 5.8.1 | | | | | 1 | | 1 | | |
| X 5.8.2 | | | | | | | 1 | | |
| X 5.12.35 | | | | | | | 1 | | |
| X 5.19.6 | | | | | | | | | (*) |
| X 5.19.8 | | | | | | | * | | (*) |
| X 5.31 | | | | 1 | | | | | |
| X 5.31.16 | | | | 2 | | | 5 | 3 | |
| X 5.31.17 | | | | 2 | | | 5 | 3 | |
| X 5.33.12 | | | | | | | 1 | | |
| X 5.35.6 | | | | | | | 1 | | |
| X 5.39.29 | | | | | | | | | 1 |
| X 5.39.40 | | | | | | | 1 | | |
| X 5.39.59 | | | | 1 | | | | | |
| X 5.40.6 | 1 | | | | | | | | |

LEGEND: cf. = not directly cited * = reference to gloss (*) = cf. the gloss

(*Continued on next page*)

X. [4. 2] *De sponsalibus impuberum*, c. [13] *Ad dissolvendum*." The "[] 2" is misleading: the "2, in fine" is merely meant to indicate that we need to read the end of the second *capitulum* with the incipit "Ad audientiam" in X 3.48. (There is another "Ad audientiam" at X 3.48.3.)

| Reference | Texts | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | *De paup.* | *App. ACC* | *App. minor* | *App. maior* | *Allegationes* | *QVR* | *App. mon.* | *Improbatio* | *OND* |
| X 5.40.12 | | | | | | 1 | | 1 | 2 |
| X 5.40.26 | | | 1 | 1 | 1 | | | | |
| X 5.41.4 | 1 | | | 1* | | | 1 | | cf.[23] |
| VI 1.6.6 | | | | | | 1 | | 1 | 2 |
| VI 1.6.27 | | | | 1 | | 1 | 1 | 1 | 2 |
| VI 1.13.2 | | | | | 2 | | | | |
| VI 1.13.3 | | | | | 1 | | | | |
| VI 3.4.14 | | | | | | | 1* | | |
| VI 3.17.1 | | 1 | | 3 | | | 3 | | |
| VI 3.22.1 | | | | | | | 1 | | |
| VI 5.2.2 | | | | | 1 | | | | |
| VI 5.11.6 | | | | | | 1 | 1 | | 1 |
| VI 5.12.3 | 10+ | 7 | 10+ | 10+ | 1 | 6 | 10+ | 10+ | 10+ |
| VI 5.12 reg. 39 | | | | 1 | | | | | |
| VI 5.12 reg. 72 | | | | | | | | | cf. |
| VI 5.12 reg. 79 | | | | | | | 1 | | |
| Clem. 5.1.1 | | | | 1 | | | | | |
| Clem. 5.10.1 | | | | 1 | | | | | |
| Clem. 5.11.1 | 2 | 2 | 1 | 9 | | | 7 | 7 | 6 |
| Ex. comm. 5.7.1 | | | | 1 | | | | | |

[23] It is unlikely Ockham was citing this even allusively; see the discussion on p. 305.

Table C.2: Table of Roman Law References

| Reference | Texts | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | *De paup.* | *App. ACC* | *App. minor* | *App. maior* | *Allegationes* | *QVR* | *App. mon.* | *Improbatio* | *OND* |
| Inst. 1.15.2 | | | | 1 | | | | | |
| Inst. 1.2 pr. | 1 | | | | | | | | |
| Inst. 1.2.2 | | | | | | | | | cf.[24] |
| Inst. 1.2.11 | 1 | | | | | | | | |
| Inst. 2.1.1 | 1 | 1 | | | | | | | |
| Inst. 2.1.7 | 1* | 1* | | 1* | | | 1* | 1 | |
| Inst. 2.1.8 | | | | | | | | 1 | |
| Inst. 2.1.12 | | | | | | | | | cf. |
| Inst. 2.1.40 | | | | | | | 2 | | |
| Inst. 2.1.47 | | | | | | | | | cf. |
| Inst. 2.2 | 1 | | | 2 | | | | | |
| Inst. 2.2.1 | 1 | | | 2 | | | 1 | | |
| Inst. 2.2.2 | | 2 | | 1 | | | | | |
| Inst. 2.4 pr. | | | | | | | | 4[25] | 1 |
| Inst. 2.4.1 | 1 | | | 1* | | 1 | | 1 | cf. |
| Inst. 2.4.2 | 3[26] | 4 | 1 | 3 | | 1 | 2 | 1 | 1 |
| Inst. 2.5 pr.–1 | | | | | | | | 1[27] | |
| Inst. 2.5.1 | | | | 2 | | | 1 | 1[28] | 5 |
| Inst. 2.5.2 | | | | 1 | | | | | cf.[29] |
| Inst. 2.5.4 | | | | | | | | 1 | |
| Inst. 2.8.1 | | | | | | | | | cf. |
| Inst. 2.9.1 | | | | 1 | | | 3 | | |
| Inst. 2.9.3 | | | | 1 | | | 3 | | |
| Inst. 3.14.2 | | | | | | | | | cf. |
| Inst. 3.17.1 | | | | 1 | | | | | |

LEGEND: cf. = not directly cited * = reference to gloss (*) = cf. the gloss

(*Continued on next page*)

[24] See *OND* 3.202 (1:316), for the unlikely allusion to this passage.

[25] Francis was confused, and it is contagious. He quoted from this passage, but refers to it as "in *Instituta*, capita *De usu et habitatione*" (Inst. 2.5). Mariani confusedly has "Inst. II, 3–4 [or 34], 4, pag. 13" in the *apparatus fontium* (pp. 300, 306, 313, 332), which is nonsensical. Moreover, to locate Francis's quotations in Inst. 2.4 rather than to the gloss to Dig. 7.8.1 (s.v. "nudus usus") is to ignore the fundamental difference Francis saw between *usus* and *ususfructus*.

[26] Two of these references have been corrected from Inst. 2.4.1.2 in Oliger, "Tractatus de paupertate," 509.

[27] Not Inst. II, 4–5, 4–1, though Inst. 2.4.4–2.5.1 is close; see Mariani, *Improbatio*, 306–07.

[28] Not Inst. 2.5.5; see Mariani, *Improbatio*, 301.

[29] Offler noted one passage (40.37–38) which speaks of having a "usum fundi vel domus," a possible echo of Inst. 2.5.1–2.

| Reference | Texts | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | *De paup.* | *App. ACC* | *App. minor* | *App. maior* | *Allegationes* | *QVR* | *App. mon.* | *Improbatio* | *OND* |
| Inst. 3.28 | | | | | | | 1 | | |
| Inst. 3.28.1 | | 1[30] | | | | | | | |
| Inst. 4.1.10 | | | | | | | 1 | | |
| Inst. 4.15.5 | | | | 1 | | | 1 | | |
| Dig. 1.1 | | | | 1 | | | | | |
| Dig. 1.1.1.3 | 1 | | | | | | | | |
| Dig. 1.3.5 | | | | 1 | | | | | |
| Dig. 1.3.12 | | | | | | | | | cf. |
| Dig. 1.3.31 | | | | | 2 | | | | cf. |
| Dig. 1.8.1 pr. | | | | | | | 1[31] | 1[32] | |
| Dig. 1.8.6.1 | | | | 1 | | | | | |
| Dig. 1.10.1.1 | | | | | | | | | (*) |
| Dig. 1.18.3 | | 1 | | | | | | | |
| Dig. 1.21.1 | | | | 1 | | | | | |
| Dig. 1.38.4 | | | | | 1 | | | | |
| Dig. 2.1.6 | | 1 | | | | | | | |
| Dig. 2.4.10.4 | | | | 1 | | | | | |
| Dig. 2.8.6 | | | | 1 | | | | | |
| Dig. 3.3.1 | | | | | | | 1 | | |
| Dig. 3.4.1 | | | | 1 | | | | | |
| Dig. 3.4.2 | | | | 2 | | | | | |
| Dig. 3.4.3 | | | | 1 | | | | | |
| Dig. 3.4.7.1 | | | | 1 | | | | | |
| Dig. 3.45.2 | | | | 1 | | | | | |
| Dig. 3.45.20(21) | | | | 1 | | | | | |
| Dig. 4.4.16.4 | | | | | | | | | cf. |
| Dig. 4.4.45 | | | | 1 | | | | | |
| Dig. 4.8.4 | | | | | | | | | cf. |
| Dig. 6.1.49 | | | | | | | | | cf. |
| Dig. 6.1.62 | | | | | | | 1 | | |
| Dig. 7.1.1 | 1 | 1 | | | | | | 8 | cf. |
| Dig. 7.1.3.3 | | | | | | | | 1[33] | |

LEGEND: cf. = not directly cited * = reference to gloss (*) = cf. the gloss

(*Continued on next page*)

[30] G&F, 105 reads: "… in I. [3. 28] *Per quas personas nobis adquiritur, Item, nobis.* Unde.…" The *item* refers to the *lex*, but the second *nobis* cannot refer to anything in Inst. 3.28. It is possibly an accidental reduplication from the rubric.

[31] Corrected from Dig. 1.8.1 on G&F, 842.

[32] Not Dig. 8, 1, pag. 39; see Mariani, *Improbatio*, 215.

[33] A parallel passage to Inst. 2.5 pr., which he cites in the next paragraph.

| Reference | Texts | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | *De paup.* | *App. ACC* | *App. minor* | *App. maior* | *Allegationes* | *QVR* | *App. mon.* | *Improbatio* | *OND* |
| Dig. 7.1.4 | | | | 1 | | | | | |
| Dig. 7.1.7.1 | | | | 1 | | | | | |
| Dig. 7.1.12.2 | | | | | | | | | cf. |
| Dig. 7.1.32 | | | | * | | | | | |
| Dig. 7.1.56 | | | | | | cf. | | | cf. |
| Dig. 7.5[34] | | | | | | 2* | | 1* | 1* |
| Dig. 7.5.1 | 1 | 2 | | 1 | | 1[35] | | 1[36] | 1 |
| Dig. 7.5.2 | 2 | 2 | | 1 | | 1 | | 1[37] | 1 |
| Dig. 7.5.5 | | | | 1 | | | | | |
| Dig. 7.5.5.1 | | | | | | 2 | | 2 | 2 |
| Dig. 7.5.5.2 | | | | | | 2 | | 2 | 2 |
| Dig. 7.5.7 | 2 | 2 | | | | | | | |
| Dig. 7.8.1 | | | | * | | | *[38] | | * |
| Dig. 7.8.2 | | | | 1 | | | | | |
| Dig. 7.8.8 | | | | | | | | | cf. |
| Dig. 7.8.10 | | | | 10 | | | | | |
| Dig. 7.8.12 | | | | | | | | | cf. |
| Dig. 7.32.39 | | | | | | | 1 | | |
| Dig. 8.1.1 | | | | 1 | | | | | |
| Dig. 8.1.20 | 1[39] | | | | | | | | |
| Dig. 8.4.18 | | | | | | | | | (*) |
| Dig. 12.1.2 | | | | | | | 2 | | |
| Dig. 12.1.3 | 1[40] | | | | | | 1 | | |

LEGEND: cf. = not directly cited * = reference to gloss (*) = cf. the gloss

(*Continued on next page*)

[34] John made reference to a gloss to the rubric of Dig. 7.5; Francis and Ockham responded to him.

[35] Although all editions of *QVR* are agreed that John cited Dig. 7.5.1 and 7.5.2, these laws do not support his argument the way 7.5.5.1 and 7.5.5.2 do (which he also cited elsewhere).

[36] Not Dig. 8, 1, 1, pag. 127; see Mariani, *Improbatio*, 281.

[37] Not Dig. 8, 1, 2, pag. 127; see ibid.

[38] At *App. maior*, 255, and *App. mon.*, 829, Michael claimed that the definition, "usus est ius utendi rebus alienis, salva rerum substantia," derives from the text and gloss of Dig. 7.8.1, but it is only found in the *Gloss* (s.v. "etiam nudus usus").

[39] Oliger, "Tractatus de paupertate," 510 n. 4, is right to remark: "In hoc titulo nihil inveni ad rem faciens."

[40] The text reads (ibid., 510): "ff. *si certum petatur*, l. *sicut*," which as Oliger rightly noted seems to be a reference to Cod. 4.2 except for the fact that the word *sicut* is nowhere to be found. A gloss to the just quoted Dig. 7.5.7 (s.v. "Qualitatis") might provide a clue, however; it reads: "ut infra si cer. pet. l. cum quid." Although this is surely a confused reference itself,

| Reference | Texts | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | *De paup.* | *App. ACC* | *App. minor* | *App. maior* | *Allegationes* | *QVR* | *App. mon.* | *Improbatio* | *OND* |
| Dig. 12.2.11.2 | | | | | | 4 | | 4 | 4 |
| Dig. 13.6.3.5 | | | | | | | 1 | | |
| Dig. 13.6.3.6 | | | | | | 1 | | 1 | cf.[41] |
| Dig. 13.6.4 | | | | | | | 1 | | cf. |
| Dig. 13.6.5 | | | | 1 | | | | | |
| Dig. 13.6.8 | | | | 1 | | | 1 | | |
| Dig. 13.6.15 | | | | 1 | | | | | |
| Dig. 13.6.17.3 | | | | | | | | | cf. |
| Dig. 14.2.2.2 | 1 | | | | | | | | |
| Dig. 15.1.25 | 2 | 1 | | 2* | | | 3 | | |
| Dig. 15.1.29 pr. | | | | | | | 1 | | |
| Dig. 15.1.29.1 | | | | | | | 1 | | |
| Dig. 15.1.41 | 1 | | | | | | 1 | | |
| Dig. 18.1.28 | | | | 1* | | | | | |
| Dig. 18.1.34.1 | | | | 1 | | | | | |
| Dig. 18.1.55 | | | | 1 | | | | | |
| Dig. 18.1.77 | | 1 | | | | | 1 | | |
| Dig. 21.1.14.9 | 1 | | | | | | | | |
| Dig. 22.1.4 | | | | 1 | | | 1 | | |
| Dig. 22.5.12 | | | | 1 | | | | | |
| Dig. 22.6.2 | | | | 1 | | | | | |
| Dig. 23.2.43.13 | | | | 1 | | | 1[42] | | |
| Dig. 27.6.1.1 | | | | 1 | | | | | |
| Dig. 28.1.21 | | 1 | | 1[43] | | | | | |

LEGEND: cf. = not directly cited * = reference to gloss (*) = cf. the gloss

(*Continued on next page*)

considering both the gloss and Bonagratia's citation, two possibilities present themselves: Dig. 7.6.5.6, i.e., *Si usus fructus petetur vel ad alium pertinere negetur*, l. *uti frui*, § *Sicut*; and Dig. 12.1.3, i.e., *De rebus creditis si certum petetur et de condictione*, l. *Cum quid*. As both references fit the context (*quasi ususfructus*), but only the second was cited elsewhere (*App. mon.*, 831), I opt for the second option.

[41] Ockham quotes John's one reference to this passage, and four times refers to money being used "ad pompam" (3.330, 14.111, 32.186–193, 109.257–259). Offler suggested this passage, but 3.330 and 32.196–193 make it more likely that Ockham was following *Glos. ord.* ad X 5.19.8, s.v. "de feudo." The same is true for Dig. 13.6.4, which Offler suggested for 3.330.

[42] Unidentified on G&F, 855, but cf. G&F, 408: they are both part of the quotation of *Glos. ord.* ad C. 24 q. 1 c. 1, s.v. "in heresim."

[43] Wrongly noted (G&F, 294), due mostly to Michael's incorrect reference, as Dig. 21.1.21; the reference should in fact be to Dig. 28.1.21 pr.

| Reference | Texts | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | *De paup.* | *App. ACC* | *App. minor* | *App. maior* | *Allegationes* | *QVR* | *App. mon.* | *Improbatio* | *OND* |
| Dig. 28.1.21.1 | | | | 1[44] | | | | | |
| Dig. 28.3.5 | | | | | 1 | | | | |
| Dig. 28.5.2 | | | | 1 | | | | | |
| Dig. 28.5.29 | | | | | | cf. | | | cf. |
| Dig. 28.7.15 | | | | 1 | | | | | |
| Dig. 29.5.1.1 | | | | 1[45] | | | | | |
| Dig. 29.7.14.1 | | | | | 1 | | | | |
| Dig. 30.109 pr. | | | | 1 | | | | | |
| Dig. 33.2.26 | 1 | 1 | | | | | | | |
| Dig. 34.1.6 | | 1 | | 1 | | | | | |
| Dig. 34.1.23 | | 1 | | 1 | | | | | |
| Dig. 34.2.8[46] | 1 | 1 | | | | cf. | | | cf. |
| Dig. 34.5.2 | | | | 1 | | | | | |
| Dig. 34.5.20(21) | | | | 1 | | | | | |
| Dig. 34.7.1 | 1* | | | | | | | | |
| Dig. 35.1.1 | | | | | | | 1 | | |
| Dig. 35.1.42 | 1 | 2 | | 1 | | | 1 | | |
| Dig. 35.1.96 | 1 | 1 | | | | | | | |
| Dig. 36.1.13.4 | | | | | | | | | cf. |
| Dig. 39.3.14.4 | 1 | | | | | | | | |
| Dig. 39.3.15 | 1 | | | 1 | | | | | |
| Dig. 39.5.29.1 | | | | 1 | | | | | |
| Dig. 41.1.3 pr. | | | | | | | | | cf. |
| Dig. 41.1.7.7 | | | | 1 | | | | | |
| Dig. 41.1.10 pr. | | | | | | | 1 | | |
| Dig. 41.1.10.1 | | | | 1 | | | 1 | | |
| Dig. 41.1.20 | | | | 1 | | | 2 | | |
| Dig. 41.1.34 | 1 | | | 1 | | | | | |
| Dig. 41.1.52 | 2 | | | 3 | | | | | |
| Dig. 41.2 | | | | | | | 1 | | |

LEGEND: cf. = not directly cited * = reference to gloss (*) = cf. the gloss

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[44] The reference (G&F, 375) is to an impossible "ff. *De testimoniis*, l. *Haeredes*, 1," but because, like the note above, Michael was arguing here against the idea that the pope established novelties, the reference he probably had in mind was ff. *De testamentis*, l. *Haeredes*, 1 (Dig. 28.1.21.1).

[45] G&F, 316 reads "et domini appellatione continetur potissime qui proprietatem habet, ff. *Ad Silenianum*,(?) l. 1, circa principium," which is an almost verbatim quotation of this *lex*.

[46] Only Bonagratia's texts refer directly to this passage; the *OND*, quoting the *QVR*, make no direct reference, but Offler was quick to catch it; the passage was not noted by Mariani.

| Reference | Texts | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | *De paup.* | *App. ACC* | *App. minor* | *App. maior* | *Allegationes* | *QVR* | *App. mon.* | *Improbatio* | *OND* |
| Dig. 41.2.1.3 | | | | 1 | | | | | |
| Dig. 41.2.1.5 | 2[47] | 2 | | | | | | | |
| Dig. 41.2.2 | | | | 1 | | | | | |
| Dig. 41.2.3 | | | | 1 | | | | | |
| Dig. 41.2.3.1 | | | | | | | 1 | | |
| Dig. 41.2.3.8 | | | | | | | 1 | | |
| Dig. 41.2.4 | 1 | 1 | | | | | | | |
| Dig. 41.2.8 | | | | 1 | | | | | |
| Dig. 41.2.18 | | | | 1 | | | | | |
| Dig. 41.2.24 | 2[48] | 1 | | 2* | | | | | |
| Dig. 41.2.49.1 | | | | | | | 4[49] | | |
| Dig. 41.7.1 | | | | | | | | | cf. |
| Dig. 42.1.24 | | | | | | | 2 | | |
| Dig. 42.1.49 | | | | | | | 1 | | |
| Dig. 43.8.1 | | | | | 1 | | | | |
| Dig. 43.20.1 | | | | 1 | | | | | |
| Dig. 43.20.1.2 | 1 | | | | | | | | |
| Dig. 43.20.1.3 | 1 | | | | | | | | |
| Dig. 43.20.11 | | | | 1 | | | | | |
| Dig. 43.26.12 | | | | | | | | | cf. |
| Dig. 43.26.16 | | | | 1 | | | | | |
| Dig. 44.7.54 | | | | 1 | | | | | |
| Dig. 45.1.38 pr. | 1 | | | | | | 1 | | |
| Dig. 45.1.38.9 | 2 | | | | | | | | |
| Dig. 45.1.75 | 1 | | | | | | | | |
| Dig. 45.1.119 | | | | 1 | | | | | |
| Dig. 45.3.1 | 1 | | | | | | | | |
| Dig. 45.3.36 | | | | | | | | | cf. |
| Dig. 46.1.22 | 1 | 1 | | 2[50] | | | | | |
| Dig. 46.1.73 | 1 | | | | | | | | |

LEGEND: cf. = not directly cited * = reference to gloss (*) = cf. the gloss

(*Continued on next page*)

[47] Oliger, "Tractatus de paupertate," 502, incorrectly suggested Dig. 41.1.1.5.

[48] Due to his error in the note above, ibid., could not identify this reference.

[49] Corrected from ff. [29. 2] *De adquirendis possessionibus*, l. [6] *Qui in aliena* (G&F, 249); "ff. [41.2] *De adquirenda possessione*, l. [1]*Possessio;* [29. 2. 6] *Qui in aliena*" (G&F, 702); and from "ff. [41. 2] *De adquirendis possessionibus*, l. [49] *Possessio*, [§] *Quae in aliena*" (G&F, 810). The correct reference is given on G&F, 843; in all cases *Qui in aliena* is cited in a group of common references. Discussed above on p. 136.

[50] Wrongly listed once (G&F, 377) as ff. [46. 1] *De fideiussoribus*, l. [1] *Mortuo*.

| Reference | Texts | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | *De paup.* | *App. ACC* | *App. minor* | *App. maior* | *Allegationes* | *QVR* | *App. mon.* | *Improbatio* | *OND* |
| Dig. 46.3.55 | 1 | 1 | | | | | | | |
| Dig. 47.2.1 | | | | | | | 2 | | |
| Dig. 47.2.20.1 | | | | | | | 1 | | |
| Dig. 47.10.13.1 | | | | | | | | | cf. |
| Dig. 47.22.1 | | | | * | | | | | |
| Dig. 47.22.1.2 | | | | 1 | | | | | |
| Dig. 47.22.3 pr. | | | | 1 | | | | | |
| Dig. 48.5.22(21) | | | | 1 | | | 3 | | |
| Dig. 49.4.1 | | 1 | | | 1 | | | | |
| Dig. 49.7.1 | | | | | 1 | | 1 | | cf. |
| Dig. 49.15.12.2 | | | | | | | 1 | | |
| Dig. 49.17.19.2 | | | | 1 | | | | | |
| Dig. 50.1.1 | | | | 1 | | | | | |
| Dig. 50.1.1.2 | | | | 1 | | | 1 | | |
| Dig. 50.1.14 | | | | 1 | | | 1 | | |
| Dig. 50.4.3 | | | | 1 | | | | | |
| Dig. 50.4.11.1 | | | | 1 | | | | | |
| Dig. 50.9.5 | | | | 1 | | | | | |
| Dig. 50.16.49 | 1 | | | | | | | | |
| Dig. 50.16.78 | | | | | | | 1[51] | | |
| Dig. 50.16.125 | 1 | | | | | | | | |
| Dig. 50.16.188 | 2 | | | | | | 1 | | |
| Dig. 50.16.217.1 | | | | 1 | | | | | |
| Dig. 50.17.1 | 1 | | | 1 | | | | | |
| Dig. 50.17.15 | 2 | 1[52] | | | | | | | |
| Dig. 50.17.23 | 1 | | | | | | | | |
| Dig. 50.17.27 | * | | | | | | | | |
| Dig. 50.17.32 | | | | 1 | | | 1 | | |
| Dig. 50.17.54 | | | | 1 | | | | | |
| Dig. 50.17.67 | 1 | | | | | | | | |
| Dig. 50.17.82 | | | | 1 | | | | | |
| Dig. 50.17.93 | 1 | 1 | | | | | | | |
| Dig. 50.17.155.1 | | | | | | | | | cf. |
| Dig. 50.17.160.1 | | | | 2 | | | 1 | | |
| Dig. 50.17.163 | | | | 1 | | | | | |
| Dig. 50.17.178 | | | | | 1 | | | | |

LEGEND: cf. = not directly cited * = reference to gloss (*) = cf. the gloss

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[51] Unidentified on G&F, 672.

[52] Reading "l. [*Is*] *qui actionem*."

| Reference | Texts | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | *De paup.* | *App. ACC* | *App. minor* | *App. maior* | *Allegationes* | *QVR* | *App. mon.* | *Improbatio* | *OND* |
| Cod. 1.1.4 | | | | 3[53] | | | | | |
| Cod. 1.1.8 | | 1 | | 1 | | | | | |
| Cod. 1.2.23 | | 1 | | | | | | | |
| Cod. 1.3.54(56) | | | | 2 | | | 1 | | |
| Cod. 1.5.12 | | | | | 1 | | | | |
| Cod. 1.6.44 | 1 | | | | | | | | |
| Cod. 1.9.9 | | | | 1 | | | | | |
| Cod. 1.14.4 | | | | | 1 | | | | |
| Cod. 1.14.5 | | | | | 2 | | | | |
| Cod. 1.17.1.6 | | | | 1 | | | 1 | | |
| Cod. 1.19.2 | | | | | 2 | | | | |
| Cod. 1.19.7 | | | | | 1 | | | | |
| Cod. 1.23.1 | | | | 1 | | | | | |
| Cod. 2.3.20 | | | | | | | 1 | | |
| Cod. 2.7.13 | | | | | | | 1 | | |
| Cod. 2.7.25 | | | | 1 | | | | | |
| Cod. 3.32.2 | | | | | | | | | cf. |
| Cod. 3.5.1 | | | | | 1 | | 1 | | |
| Cod. 4.2(?)[54] | | | | | | | | | |
| Cod. 4.24.10 pr. | | | | | | | 1 | | |
| Cod. 4.35.21 | | | | 1 | | | 3 | | cf. |
| Cod. 4.38.14 | | | | 1 | | | 2 | | |
| Cod. 4.44.2 | | | | | | | | | (*) |
| Cod. 4.51.1 | | | | 1[55] | | | | | |
| Cod. 4.52.3 | | | | 1 | | | | | |
| Cod. 4.61.6 | | | | 1 | | | | | |
| Cod. 4.63.2 | | | | 1 | | | | | |
| Cod. 6.2.12 | | 1 | | | | | | | |
| Cod. 7.1.2 | | 1 | | | | | | | |
| Cod. 7.48.4 | | | | | 1 | | | | |
| Cod. 8.33(34).3 | | | | | | | | | cf. |
| Cod. 8.53(54).12 | | | | 2 | | | | | |
| Cod. 8.53(54).14 | | | | 1 | | | | | |
| Cod. 8.53(54).17 | | | | 1 | | | | | |
| Cod. 8.53(54).19 | | | | 1 | | | | | |

LEGEND: cf. = not directly cited * = reference to gloss (*) = cf. the gloss

(*Continued on next page*)

[53] One reference (G&F, 400) is wrongly listed as Cod. 1.4.

[54] See the discussion on p. 349 n. 40, above.

[55] The text (G&F, 315) reads "et per totum."

| Reference | Texts | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | *De paup.* | *App. ACC* | *App. minor* | *App. maior* | *Allegationes* | *QVR* | *App. mon.* | *Improbatio* | *OND* |
| Cod. 10.1.4 | | | | | 1 | | | | |
| Cod. 10.16.3 | | | | 1 | | | | | |
| Cod. 10.16.4 | | | | 1 | | | | | |
| Cod. 10.17.1 | | | | 1 | | | | | |
| Cod. 10.27.1 | | | | 1 | | | | | |
| Cod. 10.42(41).2 | | | | 1[56] | | | | | |
| Cod. 10.42(41).6 | | | | 1[57] | | | | | |
| Cod. 10.43(42).1 | | | | 1 | | | | | |
| Cod. 10.47(46) | * | | | | | | | | |
| Cod. 10.49(48).1 | | | | 1 | | | | | |
| Cod. 10.49(48).2 | | | | 1[58] | | | | | |
| Cod. 11.30(29).3 | | | | | 1 | | | | |
| Nov. 7.2 | | | | 1 | | | | | |
| Nov. 22.4 | 1[59] | | | | | | | | |

[56] Corrected from Cod. 10.42(43).2 on G&F, 357.

[57] Corrected from Cod. 10.42(43).6 on G&F, 357.

[58] G&F, 357, reads: "et C. [10. 49 (48)] *De quibus muneribus vel praestantiis nemini se liceat excusare*, l. 1. [] 2."; since the first *lex* only contains one subsection, it seems best to read "*lex* 1 ⟨et⟩ 2."

[59] Listed as "Auth. seu Novellae cap. 2, tit. 1" in Oliger, "Tractatus de paupertate," 324.

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